

CITATION: *Carleton Condominium Corporation No. 396 v. Burdet*, 2011 ONSC 5807
COURT FILE NO.: 09-45430
DATE: 2011-09-30

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
CARLETON CONDOMINIUM) Janice Payne, for the Plaintiff
CORPORATION NO. 396)
)
Plaintiff)
)
– and –)
)
CLAUDE-ALAIN BURDET, CLAUDE-) Jonathan H. Fine and Claude Alain Burdet,
ALAIN BURDET IN TRUST, 1457563) for the Defendants
ONTARIO CORPORATION, 145763)
ONTARIO CORPORATION IN TRUST,)
JANET SUE BURDET, NELSON STREET)
LAW OFFICES, L’ACADÉMIE)
CHRISTIANE SAUVÉ INC., and)
INTERNATIONAL BEAUTY DEPOT)
)
Defendants)
)
) **HEARD:** October 26, 2010 (Ottawa)

REASONS FOR JUDGMENT

KANE J.

[1] Carleton Condominium Corporation No. 396 (“CCC 396”) started this action by Statement of Claim on June 23, 2009 against Mr. Burdet personally, Mr. Burdet in trust (the “Trust”), 1457563 Ontario Corporation (“1457563”), 1457563 Ontario Corporation in trust, Janet Burdet, Nelson Street Law Offices, L’Académie Christiane Sauvé Inc. and International Beauty Depot seeking an order:

- (a) For immediate possession of Units 1 through 10, and 13 through 18 (Level A), Units 2, 3, and 9 (Level 1), and Units 2 and 3 (Level 2) – (total 21 units);
- (b) Terminating any leases in relation to Units 2, 3, and 9 (Level 1), and Unit 3 (Level 2);
- (c) Judgment for the arrears of common expenses, interest and costs against the units.

[2] CCC 396 brought this Rule 20 motion for summary judgment seeking:

- (a) Possession of the above units in order to deliver possession upon sale;
- (b) Authorizing disbursement to CCC 396 of money held in trust by their solicitors from the defendants, and
- (c) Judgment for the arrears of common expenses against the defendants and leave, if necessary, to amend the motion to include this remedy.

[3] CCC 396 alleges that:

- (a) Mr. Burdet personally is the registered owner of Unit 4 (Level A);
- (b) The Trust is the registered owner of Units 1 through 3, 5 through 10, and 13 through 18 (Level A);
- (c) 1457563 Ontario Corporation is the registered owner of Units 2 and 3 (Level 1);
- (d) Janet Burdet is the registered owner of Unit 9 (Level 1) and Units 2 and 3 (Level 2).

[4] I repeat and rely on the statement of facts and defined terms in my decision dated September 30, 2011 on Mr. Burdet's motion to stay or dismiss the Statement of Claim in Action No. 09-CV-18977.

[5] On April 29, 2005 CCC 396 registered a condominium lien securing unpaid common expenses pursuant to s. 85 of the *Condominium Act* (the "Act") on Units 1 through 10, and

13 through 18 (Level A). The liens against those 16 units were for unpaid expenses pursuant to the 2005 Order in the amount of \$72,248.83 (“2005 Arrears”).

[6] CCC 396 registered liens on March 31, 2008 against Units 2, 3, and 9 (Level 1) and Units 2 and 3 (Level 2) pursuant to s. 85 of the *Act* securing common expense arrears owing and for the three months prior to that date. The amount of those liens are:

- (a) Unit 3 (Level 1) – \$10,820.35;
- (b) Unit 2 (Level 1) – \$10,820.35;
- (c) Unit 3 (Level 2) – \$11,789.67;
- (d) Unit 9 (Level 1) – \$7,456.50;
- (e) Unit 2 (Level 2) – \$11,638.18;

for a total of \$52,525.05.

[7] The plaintiff alleges in the Statement of Claim that the balance owing under the above notices of lien, as of June 2009, was approximately \$109,291.00.

[8] On February 19, 2009, CCC 396 executed and delivered notices of sale under lien pursuant to Part III of the *Mortgages Act*. Each of the defendants has failed to pay the amount alleged to be owing and as a result, CCC 396 seeks possession in the same manner as a mortgage, as confirmed under s. 7 of the *Land Registration Reform Act*, R.S.O. 1990, c. L.4.

[9] Mr. Burdet, the Trust, 1457563 Ontario Corporation, 1457563 Ontario Corporation in trust, and Janet Burdet served and filed a Statement of Defence and Counterclaim.

[10] The Statements of Defence alleges that:

- (a) Mr. Burdet, Luc Burdet and Janet Burdet are the Directors of CCC 396 and have been since 2001;

- (b) CCC 396 has not produced audited financial statements for the corporation between 2002 and 2008;
- (c) The defendant unit owners were not informed regarding major financial decisions taken by the corporation;
- (d) The defendant unit owners have not been provided with accounting of common expenses since January 2002;
- (e) The amount indicated in the lien documents is incorrect;
- (f) Each unit is entitled to its own separate accounting which CCC 396 has failed to do in its grouping of combined accounts resulting in confusion;
- (g) CCC 396 has diverted payments intended to be applied to specific units and credited other units. It has misallocated payments and failed to credit payments made by the defendants;
- (h) The defendants paid to the lawyers of CCC 396 the sum of \$104,185.16 on April 6, 2009 as security for the purported liens with instructions that such funds were not to be released to CCC 396;
- (i) The defendants contest the validity of a substantial portion of the expenditures attributed to CCC 396; and
- (j) The defendants hold executed promissory notes in the amount of \$296,887.00 issued by CCC 396 and the defendants are entitled to a set-off against the present claim by the condominium corporation. The result is that CCC 396, after this set-off, owes monies to the defendants and is therefore not entitled to enforce the subject liens.

[11] In its Counterclaim, the defendants seek:

- (a) To present an oppression claim against CCC 396;

- (b) A declaration that the liens registered on the units owned by the defendants are invalid and must be discharged;
- (c) A requirement that CCC 396 produce all financial records, corporate books and documents from January 1, 2002 to date;
- (d) An order that CCC 396 hold forthwith a special meeting of owners to vote and elect the Board of Directors and that such Board of Directors shall manage the corporation;
- (e) That the Board of Directors produce audited financial statements for the years 2002 through 2008 and call an annual general meeting;
- (f) A declaration that the promissory notes issued by CCC 396 may set-off against monies owed to CCC 396; and
- (g) Damages for loss of rent, interest, economic opportunity, inconvenience, risk of eviction.

[12] The above Counterclaim remedies, (c), (d) and (e) repeat remedies sought by Mr. Burdet in his Counterclaim in Action No. 01-CV-18977.

[13] CCC 396 filed several affidavits updating what it alleges the defendants owe by way of arrears in the form of common expenses, contained in:

- (a) Amended Motion Record – October 18, 2010;
- (b) Supplementary Motion Record – December 6, 2010;
- (c) Second Supplementary Motion Record – May 2, 2011;
- (d) Third Supplementary Motion Record – July 6, 2011;

which include in total, eight affidavits of an officer of the court-appointed Administrator and its solicitor.

[14] The defence filed 11 reply affidavits contained in:

- (a) Defendants' Motion Record;
- (b) Supplementary Motion Record – May 2011;
- (c) Motion Record – May 2011;
- (d) Second Supplementary Motion Record – June 1, 2011.

[15] Several of those affidavits are affidavits filed in Action No. 01-CV-18977.

[16] Luc Burdet in his affidavit on this motion states that:

- (a) The Board of Directors never approved the increases in monthly common expenses since the appointment of the Administrator in April of 2002;
- (b) The Administrator has not been transparent in his management of the condominium units as he failed to carry out an audit since its appointment;
- (c) The members of the Board of Directors, consisting of Mr. Burdet, Janet Burdet and Luc Burdet, have not been informed or participated in the governance of CCC 396 since the 2002 Order and there has been no annual general condominium meeting for over eight years;
- (d) The defendants have no means to verify the finances of CCC 396. The power of sale proceedings and the possession requested by CCC 396 was not authorized by the Board;
- (e) The payment of \$72,248.83 in June of 2005 by Mr. Burdet “constitutes a windfall for the corporation and the plaintiffs”. The condominium corporation has failed to account as to these funds to the condominium’s Board of Directors;
- (f) The plaintiffs, Patrick Dewan, Domicile Developments Inc., 1436984 Ontario Ltd., Amira Gabriel, 1496055 Ontario Inc., 117490 Canada Ltd. and Sheila Eberts, and the Administrator as their agent, are not using the monies of

CCC 396 in the best interest of the corporation and in fact are using the corporation's money to pay their own legal fees;

- (g) During the Eberts Action, the defendants loaned money to E.T.R.E. to support the financial situation of CCC 396; these loans to E.T.R.E. are partly secured by promissory notes bearing interest.

[17] Luc Burdet in his affidavit states that, on occasion, the Administrator has misapplied payments made, thereby overstating any liability shown owing for the two units owned by 1457563. Luc Burdet refers to payments made, payments not credited or misapplied and charges improperly entered on unit accounts. The total of the instances referred to in paras. 41 to 45 of his affidavit total \$13,508.30. CCC 396 is claiming total liability of \$272,517.81, of which the defendants acknowledge not paying \$109,440.52.

[18] The \$72,248.83 claimed in the liens registered against the 16 Level A units consists of the amounts payable in the 2002 Order and in the 2005 Order. That total consists of several costs awards as well as an order that Mr. Burdet pay back to the corporation amounts he removed from CCC 396's bank accounts after the appointment of the Administrator in 2002.

[19] Mr. Peart in his affidavit dated May 2011, as to the \$72,248.83 states that CCC 396 only received \$51,253.52. While that may technically be correct, the defendants paid the full amount ordered in the 2002 and 2005 Orders by June 10, 2005.

[20] Counsel for Mr. Burdet paid \$72,248.83 on June 10, 2005 by paying:

- (a) \$20,996.31 to counsel for Patrick Dewan et al., plaintiffs in Action No. 01-CV-18977; and
- (b) \$51,252.52 to the Administrator of CCC 396.

[21] The \$72,248.83 figure is not arrears of common expenses. CCC 396 was entitled to a lien for unpaid common expenses, interest thereon, the cost of lien registration and legal fees pursuant to s. 85(1)(3) of the *Act*. Once registered, however, the lien applies to any existing and subsequent default in payment of common expenses after the registration of the lien. See

s. 85(3)(b). CCC 396 alleges there were unpaid common expenses for these units as of June 10, 2005.

[22] CCC 396 on February 19, 2009 served notices of sale under lien against each of the 16 units on Level A claiming default in payment of monies under the April 29, 2005 lien registered against those units. The amounts claimed in each of those notices of sale are each in the amount of \$40,523.75 consisting of:

- (a) \$11,666.57 for condominium fees;
- (b) \$24,000.00 for special assessments;
- (c) \$3,857.18 for interest on condominium fees and special assessments;
- (d) \$1,000.00 for legal fees and disbursements;

and do not include the 2005 Arrears.

[23] The notices of sale under lien for the other units owned by the defendants are dated February 19, 2009 and allege indebtedness as follows:

- (a) Unit 2 (Level 1) – \$12,422.12, consisting of:
 - (i) \$1,101.16 for condominium fees;
 - (ii) \$9,039.00 for special assessments;
 - (iii) \$1,281.96 for interest on condominium fees and special assessments;
 - (iv) \$1,000.00 for legal fees and disbursements.
- (b) Unit 3 (Level 1) – \$12,408.48, consisting of:
 - (i) \$1,101.16 for condominium fees;
 - (ii) \$9,027.04 for special assessments;

- (iii) \$1,280.28 for interest on condominium fees and special assessments;
 - (iv) \$1,000.00 for legal fees and disbursements.
- (c) Unit 9 (Level 1) – \$8,631.39, consisting of:
- (i) \$727.46 for condominium fees;
 - (ii) \$80.00 for R. Horlin charges;
 - (iii) \$5,971.50 for special assessments;
 - (iv) \$852.43 interest on condominium fees and special assessments;
 - (v) \$1,000.00 for legal fees and disbursements.
- (d) Unit 2 (Level 2) – \$11,184.30, consisting of:
- (i) \$981.84 for condominium fees;
 - (ii) \$8,059.50 for special assessments;
 - (iii) \$1,142.96 for condominium fees and special assessments;
 - (iv) \$1,000.00 for legal fees and disbursements.
- (e) Unit 3 (Level 2) – \$11,184.30, consisting of:
- (i) \$981.84 for condominium fees;
 - (ii) \$8,059.50 for special assessments;
 - (iii) \$1,142.96 for condominium fees and special assessments;
 - (iv) \$1,000.00 for legal fees and disbursements.

[24] In response to the above notices of sale, totalling \$96,354.34, Mr. Burdet on behalf of the defendants on April 7, 2009 paid \$104,185.16 to the lawyers of CCC 396 on the term that it be

retained in that law firm's trust account and not released to CCC 396 pending the trial in this matter. The payment was made on behalf of all defendants to ensure that the sale of the units not proceed. Those trust monies have remained in that trust account since April 7, 2009.

[25] CCC 396 acknowledged receipt by its lawyers of such payment and indicated that because the defendants refused to release that money to CCC 396, the arrears claimed against the unit owners remained outstanding and accordingly it was proceeding to issue a claim for possession as contained in the subsequently issued Statement of Claim.

[26] The affidavit from the Administrator dated October 18, 2010, states that as of October 12, 2010, the defendants owed total arrears for common expenses and special assessments of \$221,126.23. The ledgers filed as exhibits to this affidavit indicate that the last payment by the defendants of common expenses against their units was on April 1, 2009.

[27] In a subsequent affidavit dated December 6, 2010, Mr. Davidson states that as of December 3, 2010 the current amounts owing by all the defendants, excluding fees, interest and legal costs, is \$241,988.21.

[28] Mr. Davidson in his May 2, 2011 affidavit states that as of April 29, 2011, the amount owed by the defendants under the notices of lien for arrears of common expenses, excluding late fees, interest and legal fees, is \$261,674.00.

[29] The Administrator's further affidavit dated June 6, 2011 states that the Level A units have always since the appointment of the Administrator been in a negative balance. He further states that the arrears as of June 6, 2011 for all units owned by the defendants is \$272,517.81. He attaches an aged accounts receivable list as of June 3, 2011. It does not identify a unit registered in the name of Mr. Burdet personally. I have the same difficulty regarding Units A-2 and A-3.

[30] The Administrator states that on the advice of Mr. Burdet and Janet Burdet, he set up accounts at the start of his mandate commencing April 2, 2002, with a zero balance for each unit owned or controlled by the defendants.

[31] The statement from Mr. Davidson for the 16 Level A units indicates a net balance owing for the 16 Level A units as of June 2002 of \$798.93. On the basis of that entry, Mr. Peart states that there were arrears in payment of common expenses secured by the April 29, 2005 liens, which were not paid off by June 10, 2005 when Mr. Burdet paid the \$72,248.33.

[32] The statements filed by the Administrator for the two units owned by 1457563 and the three units owned by Janet Burdet each show an amount owing by the unit owner to CCC 396 in December of 2001. Each of those unit statements confirm the affidavit of Mr. Davidson that based on the advice to him by Mr. Burdet and Janet Burdet, the Administrator's account for each of those units was reduced to a zero balance commencing June 1, 2002 when the Administrator began recording monthly debits and credits to these unit statements. The negative balance owing for the Level A units was reduced to zero by the Administrator as of June 1, 2002.

[33] The issue on this motion is whether CCC 396 has established that there is no genuine issue requiring a trial. The question therefore is, has CCC 396 proven that there is no issue requiring a trial as to the defendants' liability in the amount of \$272,517.81 or part thereof.

[34] Whereas CCC 396 must show there is no issue for trial within the context of Rule 20.04(2.1), the defendants must put their strongest position forward that a trial is necessary and a real chance of success at trial. See *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996)*, 28 O.R. 3d 423 (Gen. Div.) and *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423.

[35] This motion is complicated and compromised because:

- (a) The Administrator has not regularly presented and obtained court approval of its performance and statements of account since appointment in 2002; and
- (b) The state of account documentation presented on this motion.

[36] Even without periodic court approval, what the Administrator should have filed on this motion is a statement of account with a running balance per unit from the date of its appointment to the date it seeks judgment.

[37] The documentation filed by the Administrator is deficient in the following respects:

- (a) Mr. Burdet would not disclose to MLL who were the beneficial owners of the 15 Level A Trust units. One Level A unit is owned by Mr. Burdet personally. I agree with the defendants that there should be a separate statement of account per unit showing debits, credits and running balances. The statements presented combine all 16 units as one account;
- (b) The combined statement for the 16 Level A units commencing August 1, 2005 (Exhibit 6 – January 1, 2010) indicates credits from Ted Rubac Ent. and Rubac in the first four months of 2003. Presumably these are the same entities but I do not know what the credits are for, or whether they apply to all or only some of the Level A units;
- (c) The statements attached as exhibits include what appear to be copies of computer screens. Some of those include what appear to be credits. Due to the lack of detail, however, I do not know whether these credits are simply adjustments made by the Administrator or are payments by the unit owner. The defendants challenge everything done by the Administrator;
- (d) Some of the unit statements refer to special assessments without identifying what they are for;
- (e) The combined statement of the 16 Level A units commencing February 1, 2000 (Exhibit D – May 2, 2011) shows no debits or credits for the period April 1, 2002 until June 1, 2002). The Administrator was appointed in April 2002;
- (f) There are statements with adjusted negative balances for all units. The combined Level A unit statements (Exhibit 6 – January 25, 2010) however run from August 1, 2005 to January 1, 2010. The running statements for the other five units on Level 1 and 2 do not show running entries and balances between April of 2003 and May of 2005 or, in some cases, until March of 2006;

- (g) The Administrator attaches as exhibit A to that affidavit a one-page aged accounts receivable list. That list assigns a different account number to the 16 units of Level A. It includes, condo numbers A-2 and A-3 which I have difficulty aligning with the previous identification of units used in the Administrator's documentation.

[38] The other evidence as to the amount owing, consists of points in time statements, (e.g. Exhibit A – June 6, 2011) and information from the Administrator in his affidavit.

[39] The defendants chose not to cross-examine the Administrator. They filed a combined running statement balance for all units of the defendants showing a combined credit balance of \$1,234.44 as of their last payment of common expenses on March 1, 2009. This statement however records no liability for or payment of special assessments levied.

[40] The defendants acknowledge that no payments have been paid by them on the 21 units since March 1, 2009.

[41] The only basis upon which the defendants can successfully argue that their units by March of 2009 were current, had no arrears in payment of common expenses is by:

- (a) Crediting the defendants with the \$104,185.16 paid into the lawyer's trust account which the defendants refused to deliver to the condominium corporation;
- (b) By denying responsibility for the special assessments levied by the manager since 2002. The defendants do not get to pick and choose what they will or will not pay.

[42] The defendants claim the combined credits balances at the start of the Administrator's mandate. Janet Burdet's summary indicates the defendants' combined credit balance for all units of the defendants:

- (a) As of April 1, 2002 was \$7,704.00;
- (b) As of March 1, 2009 was \$1,234.44, which is the last payment by the defendants.

[43] The state of the evidence prevents a summary judgment for \$272,517.81. There remains however the defendants' admission that they have made no payment since March 2009, what is the amount of that liability and, am I satisfied that liability is owing in excess of that amount for the purpose of Rule 20.04(3).

Claim of Set-Off

[44] As stated above, the defendants also allege that they are entitled to a set-off in the amount of \$296,887.00 against any liability they owe CCC 396. The defendants treat this amount as if it is owed by CCC 396 to them individually, collectively or to some of them. They did not produce promissory notes on this motion payable to them. The evidence instead suggests this amount is liability claimed owing to Etre Inc., a corporation or business which Mr. Burdet established to distance himself from CCC 396.

[45] The 2002 Order on an interlocutory basis, appointed MLL auditors of CCC 396 to prepare a forensic audit for the years 1998 to 2001. That firm was ordered to produce a summary of the financial activity of CCC 396 for the years 1998 to 2001 and to ascertain the source and allocation of funds used by CCC 396 those years. Mr. Burdet by the 2002 Order was directed to provide MLL with all of his records relating to the management of CCC 396 by himself and E.T.R.E. Inc. over the period January 1, 1998 to March 31, 2002 and provide complete access to all financial books and records of CCC 396.

[46] MLL prepared a report entitled "Audit findings and difficulties encountered during the audit of the financial statements" regarding Carleton Condominium Corporation no. 396 for the years ended December 31, 1998 – 2003, dated November 25, 2004. In that report, the author states that to conduct an audit and provide an audit opinion, it is necessary by the accounting professional standards to disclose all related parties and related party transactions. In that regard, the auditors wished to determine the nature of the relationship between E.T.R.E. or E.T.R.E. Inc. Mr. Burdet and CCC 396 during the five-year audit period.

[47] MLL found indications of a possible relationship between E.T.R.E. Inc. and Mr. Burdet which included:

- (a) E.T.R.E. Inc. stands for Entreprises Ted Rubac Entreprises and Ted Rubac which is the spelling of C.A. Burdet in reverse order;
- (b) During the period under review, Mr. Burdet as President of the condominium corporation charged his professional fees through E.T.R.E. Inc. rather than invoicing CCC 396 directly. The auditors questioned Mr. Burdet why he would send his invoices for professional services through E.T.R.E. Inc. rather than directly to CCC 396;
- (c) The sole Director of Entreprises Ted Rubac Entreprises, or E.T.R.E. Inc. was a woman by the name of C.E. Burdet who is believed to be the daughter of Mr. Burdet and Janet Burdet;
- (d) The signing authority for E.T.R.E. Inc. was Janet Burdet who was at the time a Director of CCC 396 and is, or was, the wife of Mr. Burdet;
- (e) It appeared that Janet Burdet worked for E.T.R.E. Inc. in addition to being a Director and Secretary-Treasurer of CCC 396;
- (f) Dr. Burdet refused to disclose to the auditors who were the beneficiaries of the Trust Units registered. The concern of the auditors was that Mr. Burdet may be the beneficial owner of some or all of the Level A units registered in trust, thereby placing him in a majority control position within CCC 396 with the resulting conflict in the approval of his fees billed through E.T.R.E. Inc.;
- (g) During the above audit, Mr. Burdet also refused to provide third party invoices billed by E.T.R.E. Inc. to CCC 396 beyond the invoice from E.T.R.E. Inc.;
- (h) As to whether contracts or payments or authorization, including payments by CCC 396 to Mr. Burdet, had been approved by the Board of Directors, the auditors determined that the condominium Board in March of 2001 consisted of five individuals, including Mr. Burdet and Janet Burdet, and that the other three Board members had been removed as Directors and prior thereto, had not been

invited to subsequent meetings because Mr. Burdet alleged that they had not paid increased condominium fees;

- (i) Luc Burdet, the son of Mr. Burdet, was elected as a Director by his father and Janet Burdet in April of 2001, thereby resulting in a Board of three persons. The reconstituted Burdet Board of Directors approved a significant number of expenses transacted through E.T.R.E. Inc. for which there were no supporting documentation beyond invoices from E.T.R.E. Inc. The Board's approval of those payments to E.T.R.E. Inc. included the participation and vote of Dr. Burdet and Janet Burdet notwithstanding the apparent conflict of interest in his case and the obvious conflict of interest in her case.

[48] In summary, Mr. Burdet refused to provide the auditors with information regarding ownership of E.T.R.E. Inc. The auditors therefore drafted financial statements with disclosure related parties and related party transactions confirmed to them, and thus without any mention of Mr. Burdet's relationship with E.T.R.E. Inc. The audit report states that they were unable to confirm or dispel the suspected relationship between Mr. Burdet and E.T.R.E. Inc.

[49] Prior to April 2002, Mr. Burdet charged fees through E.T.R.E. Inc. to CCC 396 at the rate of \$250.00 an hour regarding work involving dissident unit owners who were creating problems for CCC 396, which, in the opinion of Mr. Burdet, were not part of his responsibilities as a member of the Board.

[50] Dr. Burdet apparently also charged through E.T.R.E. Inc., fees to CCC 396 for time spent in relation to the Eberts Action against Dr. Burdet which involved how many votes the Level A unit owners were entitled to. Such fees totalled approximately \$34,000.00. MLL pointed out that CCC 396 was not a party to that action and the litigation involved the personal interest of the Level A unit owners registered in the name of Dr. Burdet and the Trust.

[51] While acknowledging that some payments may have been for valid services, MLL recorded in their report that the amount paid by CCC 396 to E.T.R.E. Inc. in total consisted of the following:

- (a) 1998 – \$49,320.00;
- (b) 1999 – \$90,027.00;
- (c) 2000 – \$140,684.00;
- (d) 2001 – \$151,244.00;
- (e) 2002 – \$187,886.00.

[52] The auditors reported that Dr. Burdet withdrew from the CCC 396 bank account and paid to E.T.R.E. Inc. the sum of \$33,674.00 on April 5, 2002, some three days after the April 2, 2002 appointment of the Administrator and Inspector. MLL further noted that \$3,500.00 was withdrawn by Dr. Burdet on May 3, 2002 to repay a portion of the line of credit extended by E.T.R.E. Inc. to the condominium.

[53] MLL in their report indicate that as of December 31, 2003, the liabilities of CCC 396 include a total of \$296,887.00 owing to E.T.R.E Inc. consisting of:

- (a) Notes payable – \$133,927.00;
- (b) Line of credit to E.T.RE. Inc. – \$13,325.00;
- (c) Amounts payable for Mr. Burdet’s fees in 2001 as approved by the Board – \$132,234.00; and
- (d) Other various payables – \$17,401.00.

[54] MLL prepared the audited financial statements for CCC 396 pursuant to the 2002 Order. Mr. Burdet challenged the same and retained an accountant, Ken Lagasse (Mr. Lagasse’), who met with Mr. Burdet for the first time in January of 2002.

[55] Mr. Lagasse, pursuant to the engagement from Dr. Burdet, commenced his engagement to prepare financial statements for CCC 396 for its fiscal years 1998 through to 2001 in February of 2002.

[56] Mr. Burdet continued with his engagement of Mr. Lagasse to prepare the audit financial statements of CCC 396 after the interim appointment of the Administrator in the 2002 Order. Mr. Lagasse's auditor's report to CCC 396 is dated September 28, 2002.

[57] Mr. Lagasse states that, unlike MLL, he had no difficulty obtaining all the necessary data and background information regarding E.T.R.E. Inc. and other third party suppliers as required for the audit. Mr. Lagasse states that he found E.T.R.E. to be in the position of a third party supplier, devoid of any form of control over CCC 396, that E.T.R.E. did not have the attributes of a "management company" in its relationship with the condominium corporation. In the notes to the financial statements prepared by Mr. Lagasse for CCC 396 for the years ending 1998 through to 2001, he states that the secretary of the condominium corporation is an employee of the supplier, Ted Rubac Enterprises Inc. (E.T.R.E.), which assisted in the provision of lines of credit and accompanying long-term promissory notes executed by CCC 396 and granted to E.T.R.E. He states that the services provided by E.T.R.E. to CCC 396 are administration, repairs and maintenance, business services, litigation support, and bookkeeping. The author further states that the legal services provided by Mr. Burdet to CCC 396 for the most parts since 1999 have been billed through and shown as a liability owing to E.T.R.E.

[58] It seems that Mr. Burdet is attempting to have the best of both worlds. In response to court-appointed auditors, he denied any relationship and insisted there was a third party distant connection between himself and E.T.R.E. or Ted Rubac Enterprises in providing services or a line of credit. Mr. Burdet chose to bill for services through either Rubac Enterprises or E.T.R.E. Inc., and not from himself directly.

[59] Having inserted such entity as the service provider, Mr. Burdet and the defendants then present the same \$297,000.00 indebtedness as a shield herein and claim a right of off-set against this claim. There is no evidence the defendants are owed this money. That is not an appropriate set-off to be considered on this motion for summary judgment against the defendant unit owners for the above reasons. The defendants have failed to show that this issue creates a triable issue to the claim of CCC 396 against these defendants. The evidence from the reports of MLL and Mr. Lagasse contradicts this argument that CCC 396 owes this money to the defendants.

[60] The monies allegedly owed by CCC 396 to E.T.R.E. in addition, is the subject of a separate action commenced by one or more of the defendants which the Court of Appeal allowed to proceed in 2008. It is now 2011. Independent of the above arguments, the defendants are prevented from shielding themselves by their claims against CCC 396 pursuant to s. 84(3)(b) of the *Condominium Act*.

[61] For the above reasons, this is not an appropriate set-off available to the defendants against liability claimed in the action.

Judgment For Full Liability Claimed

[62] The state of the records presented by the Administrator prevents full quantification and judgment for the full amount claimed by CCC 396.

[63] The evidence, either way, is unclear whether indebtedness supports CCC 396's registration of each lien and the issuance of Notices of Sale. CCC 396 is not seeking the right to an immediate sale in any event.

[64] The above conclusions however do not end the issues before me.

Evidence as to Indebtedness

[65] The parties agree the defendants have paid no common expenses or special assessments since March 30, 2009. That equals 28 months of debt to August 2001.

[66] Mr. Davidson in his January 25, 2010 affidavit attaches statements as of that date for the units of the defendants which show the following:

- (a) The Level A units owned by Mr. Burdet and the Trust show a cumulative balance owing for those units as of January 1, 2010 in the amount of \$75,013.03;
- (b) The combined monthly condominium fees for those 16 units from 2005 until May of 2009 were \$778.58 per month and increased to \$1,461.86 per month thereafter;
- (c) The running statements for the three units owned by Janet Burdet show a cumulative balance owing for each of the three units as of April 1, 2008 of

\$5,971.50, \$8,058.50 and \$10,175.64. The condominium fees per month for one of those units commencing in 2006 was \$195.96 with the other two units being \$268.29. Those monthly fees increased in May of 2009, for one unit to \$363.73 and to \$490.92 for the second and third of her units;

- (d) The two units registered to 1457563 Ontario Corporation had liens registered against them by CCC 396 on March 31, 2008. The cumulative deficit shown owing on each of those units as of March 1, 2008 is \$9,920.35 and \$8,742.37 respectively. The monthly condominium fees for each of those two units, commencing in 2006, was \$296.63. It increased for each unit in May of 2009 to \$550.58;
- (e) The combined total of the monthly common expense charges for the units owned by the defendants accordingly, as of May 2009, was \$3,908.59 per month.

[67] Accordingly, the above-mentioned combined unpaid monthly common expenses for all defendants of \$3,908.59 per month, commencing May 1, 2009 until August 1, 2011 totals \$109,440.52 of unpaid liability (“Combined Liability”). In the case of Mr. Burdet, that non-payment is in direct contravention to the provision in the 2002 Order directing him to pay monthly common expenses to the Administrator.

[68] The Combined Liability during this 28-month period does not include the negative balance owing by each of these defendant unit owners prior to March 31, 2009. It also excludes the special assessment which was levied by the Administrator on November 13, 2009.

[69] The defendants have, subject to the payment of a small administration fee to the Administrator, been entitled to access financial information from the Administrator sufficiently so to challenge the appropriateness of these common expenses per unit. See s. 55(6) of the *Act*. The defendants, belatedly, have received the annual financial statements of CCC 396 up to 2009.

[70] The defendants’ arguments go to *quantum* and when quantified, are minor in amount compared to the liability claimed in excess of the Combined Liability and should not therefore be deducted from the Combined Liability.

Amendment to the Plaintiff's Motion Seeking Judgment for the Amount Owing

[71] The plaintiff during argument requested leave to amend its amended Notice of Motion to seek judgment for the amount found due and owing against each defendant, if required. The defendants opposed such an amendment.

[72] The Statement of Claim seeks possession of the defendants' units, termination of leases and judgment for the amount owing by the defendants. The motion of CCC 396 seeks summary judgment and, in particular, possession of the defendants' units to permit sale thereof, disbursement of the \$104,185.00 in trust and such other reliefs as permitted.

[73] The order of possession sought by the plaintiff on this motion requires determination whether money was owing as alleged under the notices of lien registered against these units and, if so, whether the unit owners now remain indebted to CCC 396. Possession therefore requires determination of past and current liability.

[74] CCC 396's request to release the money in the trust account requires determination whether the defendants owe money, how much and is such debt less or more than the money in trust. To authorize payment out is equivalent to granting judgment for a debt owing.

[75] It is artificial to require the court to work through and determine the above and then argue that the court not grant judgment. The objection to the amendment requested is form over substance. The amendment is granted.

[76] In addition, the specific discrepancies in the manager's accounting and the alleged combined credit balance to the defendants' accounts as of April 2009 as alleged by the defendants are minor and do not come close to the difference between the Continued Liability and the \$272,517.81 claimed owing as of June 6, 2011.

[77] The plaintiff has presented evidence which makes it plain and obvious that there is no issue as to the defendants' present outstanding liability of at least \$109,440.52. No trial is required for the determination of that extent of liability. Judgment in that amount is granted.

[78] I am further satisfied that some amount in excess of \$109,440.52 is owing but cannot quantify the excess amount. The judgment for \$109,440.52 is apportioned using the percentage of current fees per month referred to in para. 66 above, as follows:

- (a) Mr. Burdet – Level A units - \$2,558.26;
- (b) The Trust – 15 Level A Units - \$38,373.82;
- (c) 1457563 Ontario Corporation – Units 2 and 3 (Level 1) – \$30,832.48;
- (d) Janet Burdet – Unit 9 (Level 1) and Units 2 and 3 (Level 2) – \$37,675.96.

[79] Nelligan O'Brien Payne LLP are directed to pay out from their firm's trust account the monies received from Mr. Burdet on behalf of all of the defendants on April 6, 2009 in the amount of \$104,185.16, together with any interest thereon.

[80] Having satisfied myself that the plaintiff is entitled to judgment for some liability in excess of the Combined Liability, I order a trial of that *quantum* issue pursuant to Rule 20.04(3) of the *Rules of Civil Procedure* but require submissions from counsel as to how that issue and Counterclaim should proceed herein.

[81] Counsel therefore are requested to contact the Trial coordinator and arrange for an appointment, not exceeding half a day in total, to deal with these two questions including the scheduling of a hearing date and Rule 20.05. If the Administrator in the interim obtains court approval of its annual accounts, a reference rather than a trial may be possible.

[82] In relation to the adjournment of this motion to address how to proceed on the above, I direct the defendants as a term of that adjournment to pay common expenses to the Administrator each month commencing September 1, 2011 and on the first day of each month thereafter, in the following amounts:

- (a) Mr. Burdet – \$91.37;
- (b) The Trust – \$1,370.49;

- (c) Janet Burdet for the three Units registered in her name, the sum of \$1,345.57 combined;
- (d) 1457563 Ontario Corporation, shall pay the sum of \$1,101.16 combined for its two Units;
- (e) None of the defendants shall be entitled to any exemption from the obligation to pay the above monthly amounts to the Administrator, notwithstanding an event as contemplated under s. 84(3) (a), (b), (c) of the *Condominium Act*.

[83] I know the defendants contest the amount of the above monthly common fees. The Administrator however claims they owe some \$163,000.00 in excess of the partial judgment herein granted. Any interim amount at the above rates if found to be excessive will constitute a credit against: (a) the balance determined owing and/or (b) future monthly liability.

[84] The validity of the existing liens and notices of sale is adjourned and will be determined on the trial or reference.

[85] The parties may make submissions as to costs on this motion. Those submissions should include a draft Bill of Costs. The parties should consider that the Administrator currently exercises all management functions, including the presentation of this motion and to that extent had two law firms addressing this motion.

Mr. Justice Paul Kane

Released: September 30, 2011

CITATION: *Carleton Condominium Corporation No. 396 v. Burdet*, 2011 ONSC 5807
COURT FILE NO.: 09-45430
DATE: 2011-09-30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CARLETON CONDOMINIUM CORPORATION
NO. 396

Plaintiff

– and –

CLAUDE-ALAIN BURDET, CLAUDE-ALAIN
BURDET IN TRUST, 1457563 ONTARIO
CORPORATION, 145763 ONTARIO CORPORATION
IN TRUST, JANET SUE BURDET, NELSON
STREET LAW OFFICES, L'ACADÉMIE
CHRISTIANE SAUVÉ INC., and INTERNATIONAL
BEAUTY DEPOT

Defendants

REASONS FOR JUDGMENT

Kane J.

Released: September 30, 2011