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Case Name:

Condominium Corp. 8110264 v. Farkas

Between

Condominium Corporation No. 8110264, Appellant, (Applicant),

and

Julie Ann Farkas, Respondent, (Respondent)

[2010] A.J. No. 1153

2010 ABCA 294

Docket: 0901-0242-AC

Registry: Calgary

Alberta Court of Appeal
Calgary, Alberta

R.L. Berger, F.F. Slatter and P.A. Rowbotham JJ.A.

Heard: September 14, 2010.

Judgment: October 13, 2010.

(9 paras.)

Appeal From:

Appeal from the Judgment by The Honourable Mr. Justice B.R. Burrows. Dated the 18th day of August, 2009. Filed on the 20th day of August, 2009 (2009 ABQB 488, Docket: 0901-05166).

Counsel:

J.M. McDougall, for the Appellant.

C.J. Lintott, for the Respondent.

Reasons for Judgment

The judgment of the Court was delivered by

1 F.F. SLATTER J.A.:-- The condominium corporation applied to have the respondent owner evicted from her unit. The chambers judge declined to order eviction, and the condominium corporation appeals.

Facts

2 A series of owners of the unit adjacent to the respondent's unit have complained over a number of years about noise emanating from the respondent's unit. The complaints are that the respondent slams her doors and cupboard doors repeatedly, and at all hours of the day and night. Clause 62(b) of the condominium bylaws provides that an owner may not make noise in the unit which in the opinion of the Board constitutes a nuisance or unreasonably interferes with the use and enjoyment of other units. The affidavit filed by the condominium corporation has attached a series of letters from the property managers demanding that the respondent cease and desist making the noise. The condominium corporation has fined the respondent twice, but she has refused to pay the fines.

3 The respondent deposes to her belief that the successive owners of the adjacent unit have been operating a drug laboratory in the unit, that fumes from the adjacent unit enter her unit, and that the adjacent owners have been interfering with her power and other utilities. At one point in her affidavit she suggests that the noises complained of arise from the removal of garbage, but the duration and timing of the complained of noise appears to be inconsistent with that suggestion. In other places the respondent admits slamming her doors in retaliation and to "get their attention". There is no clear statement in her affidavit that she has not caused the noise that is the subject of the complaints. Investigations by the Board and the police have failed to confirm the suggestion of a clandestine drug laboratory being operated by any of the successive owners of the adjacent unit.

Eviction of an Owner

4 The condominium corporation brought an application to have the respondent evicted from her unit, or for other relief. The chambers judge declined to order eviction, noting that the bylaws do not expressly grant the Board such a power. The bylaws permit the Board to levy a fine, and provide that the fines "may" be enforced under s. 36 of the *Condominium Property Act*, R.S.A. 2000, c. C-22. The chambers judge reasoned that the reference to s. 36 in the bylaws precluded the Board from relying on the other remedial provisions in the *Act*: *Condominium Corporation No. 8110264 v. Farkas*, 2009 ABQB 488.

5 Bylaws 43(c) and (d) authorize both monetary and non-monetary remedies. Section 36 of the *Act* sets out a procedure for a condominium corporation to collect monetary penalties it has imposed on owners. The bylaws themselves are merely permissive, stating that the condominium corporation "may" resort to s. 36. Subsection 36(7) specifically provides that an action under that section "does not restrict, limit or derogate from any other remedy that an owner or the corporation may have against that person". The chambers judge therefore erred in concluding that the reference to s. 36 in the bylaws precluded the condominium corporation from resorting to the statutory remedies in s. 67, or any common law remedies for enforcing the terms of the bylaws.

6 The bylaws provide some specific remedies for their breach, and it is not disputed that there is no express provision for the eviction of an owner. The *Act* provides the following remedies:

67(1) In this section,

(a) "improper conduct" means

(i) non-compliance with ... the bylaws by ... an owner, ...

(2) Where on an application by an interested party by means of an originating notice the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following:

- (a) direct that an investigator be appointed to review the improper conduct and report to the Court;
- (b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;
- (c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;
- (d) if the applicant suffered loss due to the improper conduct, award compensation to the applicant in respect of that loss;
- (e) award costs;

- (f) give any other directions or make any other order that the Court considers appropriate in the circumstances.

The chambers judge concluded that this section does not grant the court the power to order eviction of an owner, when that power is not provided for in the bylaws.

7 Subsection 67(2)(f) permits the court to make "any other order appropriate in the circumstances". This section is widely worded, no doubt to accommodate the varied and limitless circumstances that might arise under the collective ownership of condominium units. Counsel referred to other decisions where eviction orders have been made against owners. The power of eviction against an owner is an extraordinary one, and one which undoubtedly should only be exercised in exceptional cases, and when other incremental remedies have failed: *Condominium Plan No. 822 2909 v. 837023 Alberta Ltd.*, 2010 ABQB 111 at para. 53. However, there may be breaches that are so serious or persistent that they cannot be addressed in any other way. For example, if a unit owner really was operating a clandestine drug laboratory in the unit, eviction might well be appropriate. The chambers judge erred in concluding that eviction is not an available remedy under ss. 67(2)(f).

8 In the alternative, the chambers judge concluded that even if eviction were an available remedy, it was not justified on the record before him. When the chambers judge dismissed the application for an order of eviction, he did not deal with the request for alternative relief. The condominium corporation had clearly made out a *prima facie* case of a breach of the bylaw. The chambers judge could have appointed an investigator under ss. 67(2)(a), he could have ordered the respondent to cease making the noise, he could have ordered the trial of an issue, or he could have fashioned other relief. The simple dismissal of the application did nothing to resolve the obvious disagreement between the condominium corporation and the respondent. It is undesirable to leave the existing state of conflict in place without a remedy.

Conclusion

9 On this record there is sufficient evidence that the respondent has been causing at least some of the complained of noise. There having been breaches of the bylaw, the condominium corporation is entitled to a remedy, although the record does not justify the remedy of eviction. The appeal should accordingly be allowed, and an order granted that the respondent cease making any noise that unreasonably interferes with the use and enjoyment of other units. In the event that there is any breach of that order, the condominium corporation may apply on notice to the Court of Queen's Bench to determine what further procedures or remedies are appropriate. Either party may also apply on notice to the Court of Queen's Bench for variation of the order, should circumstances so require.

F.F. SLATTER J.A.

R.L. BERGER J.A.:-- I agree.

P.A. ROWBOTHAM J.A.:-- I agree.

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