

Court of Queen's Bench of Alberta

Citation: Condominium Corporation No. 0425177 v. Jessamine, 2011 ABQB 644

Date: 20111021
Docket: 0803 17344
Registry: Edmonton

2011 ABQB 644 (CanLII)

Between:

Condominium Corporation No. 0425177

Plaintiff

- and -

Jeffery J. Jessamine

Defendant

**Memorandum of Decision
of
L.A. Smart, Master in Chambers**

INTRODUCTION

Background

[1] The Plaintiff Condominium Corp. No. 0425177 (Condo Corp.) applies for Summary Judgment for outstanding condominium fees plus interest and costs with a six month Redemption Order as against the Defendant Jeffrey J. Jessamine (the Defendant), the owner of Unit 505 in the building known as "the Ten" located in downtown Edmonton. The amounts claimed by the Condo Corp. are categorized as:

1. Condo fees;
2. Special Assessment; and
3. Electricity Charges.

[2] At the outset of the application Counsel for the Condo Corp. withdrew the application in relation to electricity charges indicating he had determined that there was a triable issue in that regard.

[3] The Defendant acquired title to his unit on May 14, 2007. Condominium fees at that time were \$380.56 per month. The Condo Corp.'s ledgers show condo fees were allowed to accumulate for the months of June, July, and August of 2007 and then paid on August 9, 2007. No condominium fees were paid again until September 3, 2008 when a lump sum of \$6,000 was paid leaving an outstanding balance of \$1,709.41. No other amounts have been paid by the Defendant since that time.

[4] This dispute arises over the increase of condo fees to \$524.95 per month commencing January 1, 2008 and a Special Assessment requiring payments of \$222.47 commencing February 1, 2008 for a period of six months.

Legislative Framework

[5] Condominium Corporations are created by the *Condominium Property Act*, RSA 2000, c. C- 22 (the "Act") and must derive their powers from that Statute. They do not enjoy the same powers of a natural person as bestowed upon corporations under the *Business Corporations Act*, RSA 2000, c.B-9 (*Francis v. Condominium Plan No. 822-2909*, 2003 ABCA 234).

[6] Establishment of contributions (or condo fees or assessments) is governed by section 39 of the Act. The applicable subsections are as follows:

39(1) In addition to its other powers under this Act, the powers of a corporation include the following:

- (a) to establish a fund for administrative expenses, sufficient, in the opinion of the corporation, for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any other obligation of the corporation;
- (b) to determine from time to time the amounts to be raised for the purposes mentioned in clause (a);

39(2) A contribution levied as provided in subsection (1) is due and payable on the passing of a resolution to that effect and in accordance with the terms of the resolution, and may be recovered by an action for debt by the corporation

- (a) from the person who was the owner at the time when the resolution was passed, and

- (b) from the person who was the owner at the time when the action was instituted,

both jointly and severally.

39(7) A corporation may file a caveat against the certificate of title to an owner's unit for the amount of a contribution levied on the owner but unpaid by the owner.

39(8) On the filing of the caveat under subsection (7), the corporation has a charge against the unit equal to the unpaid contribution.

39(9) A charge under subsection (8) has the same priority from the date of filing of the caveat as a mortgage under the *Land Titles Act* and may be enforced in the same manner as a mortgage.

40(1) A corporation may charge interest on any unpaid balance of a contribution owing to it by an owner.

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
- (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.

[7] Counsel for the Condo Corp. quite correctly pointed out that Special Assessments are simply a name given to contributions that are established to deal with a specific issue or problem that has arisen outside the ordinary activities and obligations of the Condo Corp.

Summary Judgment Rules

[8] Rule 7.3 of the new Alberta Rules of Court apply to this application and provides as follows:

(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:

- (a) there is no defence to a claim or part of it;

- (b) there is no merit to a claim or part of it;
- (c) the only real issue is the amount to be awarded.

(2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

(emphasis added)

[9] I agree with the submissions of Counsel for the Defendant that the authorities adjudicated under Rule 159(1) apply to this application. I also accept that *732311 Alberta Ltd v. Paradise Bay Spa & Tub Warehouse Inc.*, 2003 CarswellAlta 1733 (C.A.), sets out the proper procedure and law as it applies to granting of summary judgments which states at paragraphs 10 to 12:

This court recently had an opportunity to review the test for summary judgment in *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.* [2003] A.J. No. 1305, 2003 ABCA 298. Wittmann J. cited with approval the test as set out in *Royal Bank of Canada v. McLean* (1997), 211 A.R. 297 (Q.B.) at paras. 27 to 34, where Hutchinson, J. set out a two step process.

First, the plaintiff bears the evidentiary burden of proving its cause of action on a balance of probabilities. Each and every fact necessary to support the claim must be proven: *Bank of Montreal v. Kalin* (1992), 131 A.R. 397 (C.A.).

After the plaintiff has proved its case on a balance of probabilities, the evidentiary burden shifts to the defendant but the ultimate burden remains, as always, with the plaintiff. The defendant can avoid a summary judgment in favour of the plaintiff by proving that there is a genuine issue for trial. If the defendant meets this evidentiary burden, the plaintiff fails to meet its ultimate burden. It must be beyond doubt that no genuine issue for trial exists.

Plaintiff's Material

[10] In support of the Plaintiff's application is the Affidavit of its President Terry Hodgkinson. It consists of 12 short paragraphs attaching a number of documents as exhibits. In the first paragraph she states that she has personal knowledge of the matters deposed to. Excerpts of minutes from Board of Directors meetings, the Condo Corp.'s bylaws, and a ledger of the Corp. showing the arrears are exhibited although she fails to state that any of the exhibits attached are true copies. The President was cross-examined on her affidavit. Numerous undertakings were given during that cross examination which consisted of delivery of documents and included all Board of Directors meeting minutes from the May 14, 2007 to December 9, 2008, financial statements available to the Condo Corp. and budget for 2009.

Issues Raised by Defendant

[11] Defendant's counsel points to the defect in the Plaintiff's Affidavit in that it failed to say that the documents were true. That argument is extended to the documents provided in answer to the undertakings.

[12] During questioning the President acknowledged that the ledger was deficient in that it did not include interest and some of the electrical charges. The President also acknowledged that the ledger was not prepared by her but by the Condo Corp.'s property managers.

[13] The Defendant complains that he did not receive notification of any of the increases and points to the bylaws of the Condo Corp. which prescribe the method of service to be utilized when required. The methods used for service of correspondence and notice of the increases did not conform with this requirement.

[14] Upon the Defendant receiving correspondence dated October 6th, 2008 demanding payment of outstanding condo fees, he demanded delivery of most of the documentation requested of the President during questioning. It was again demanded by the Defendant's counsel on December 22, 2008. Not until the undertakings were answered in December, 2010 did the Defendant receive that material. Notwithstanding the provision of this material, the Defendant contends he is entitled to receive further particularization of the items forming the amounts assessed, both regular and special, so that he may satisfy himself that they fall within the confines of Bylaw 4.03.

[15] Bylaw 4.03 reads as follows:

4.03 **ADMINISTRATIVE EXPENSES**

4.03.1 The Administrative Expenses of the Corporation, which are also called Common Expenses or Condominium Fees, include the following costs of and charges for supply to Corporation of:

- a. professional management services;
- b. insurance;
- c. electricity, water, garbage removal, cleaning and janitorial services;
- d. landscaping, snow removal, cleaning and janitorial services;
- e. service agreements for maintenance and repair of the Common Property;
- f. all manner of consultative and professional services including audit and accounting, engineering and legal fees and disbursements, as well as the fees and charges of any insurance Trustee engaged by the Corporation;

- g. newsletters, memberships, subscriptions, telephone, office equipment and supplies, printing and postage;
- h. borrowing money, for the purpose of carrying out the duties of the Corporation, and including monies for the payment of interest and the repayment of principal; and, in general,
- i. repair, replacement and upkeep of the Common Property and those portions of any Unit for which the Corporation is responsible.

[16] He also is of the view that the minutes are inadequate and there must be proper forms of resolutions. Finally the Defendant says that interest on any amounts in arrears should be suspended for at least the period from the demand for material upon the Condo Corp. until it was ultimately provided as undertakings.

DISCUSSION

Evidence

[17] The first issue and most critical to the success or failure of this application is the adequacy of the evidence. Corporations must speak through their officers. Officers must attest to the fact that documents exhibited to their affidavits are true copies. It is not necessary for the officer to have prepared every document attached to their affidavit, notably for example in this case, the ledger setting out amounts outstanding. The President's affidavit is clearly defective and without more would not satisfy the fundamental evidentiary requirements to succeed under Rule 7.03.

[18] In this case, however, the Defendant chose to question the officer. All of her answers were given while under oath. In my view the oath extends to the documentary undertakings delivered. It is unnecessary to provide a further assurance that they are true copies by attaching them to an affidavit stating so or otherwise. The "true" nature of the documents provided is implicit.

Balance Outstanding

[19] The Defendant expresses concerns about the accuracy of the balance outstanding disclosed in the ledger. Minutes of the Board Meetings identify serious reservations over the accuracy of information the Condo Corp. received on the turnover of the property from the developer. The ledger on its face is missing charges for electricity and does not have interest charges disclosed. Subsequent to the reservations expressed by Board Members an audit was completed and on questioning the President confirmed they were satisfied the information they now rely on was accurate. The claim for electricity has been withdrawn. Interest can be determined through simple arithmetic calculation. After removal for the electricity charges, I am satisfied the ledger properly establishes the amounts due for condominium contributions.

Resolutions

[20] Condominium corporations primarily conduct their business at board meetings. In this case written minutes were taken of the meetings. Although at times these can be described as confusing on a careful reading their intention is clear. Boards of condominium corporations are typically made up of owners most of whom have not received any training nor have any particular skill or experience dealing with corporate formalities. Many are assisted by so-called professional property managers as advisers who have widely varying skill sets and experience often with limited expertise. Matters are confounded by the industry and their lawyers who have adopted terminology, particularly in replacement Bylaws, which is inconsistent with the language used in the Act. Some boards have the fortune to have a legally trained individual with some corporate skills as an owner and who agrees to sit on the Board. Few of these, however, are experienced in the rather unique characteristics of the Act and its import when operating a Condominium Corporation. Regardless, in my view resolutions passed and recorded in the minutes of meetings by the Board are adequate memorializations of Board decisions. To require additional formalization is an unnecessary burden upon these volunteer boards and lacking of any meaningful utility.

Notice

[21] Section 39(2) provides that upon the passing of a resolution by the corporation a contribution is due and payable. There is no prerequisite or requirement for notice in the Act nor in the Bylaws of this Condo Corp. to give a specific notice pertaining to changes in contributions. Bylaws setting out the procedure for proper service of other notices are of no moment.

Powers of Corp and Determination of Contributions

[22] Section 39 (1)(a) and (b) give the Condo Corp. the power to establish a fund for its expenses and determine from time to time the amounts to be raised for that purpose.

[23] Bylaw 403 specifies items to be included in determining the amount. In my view it does not restrict nor derogate from the general powers of the Condo Corp. as prescribed by the Act. To interpret the Bylaw as restrictive would render it ultra vires the Act.

[24] In this case the increase in the general assessment was made in light of past years audited financial statements with adjustment to reflect the inevitable increases in expenses and contingencies. There is nothing in the minutes of the Board or elsewhere to suggest the Board included improper expenses in establishing the regular assessment. As for the special assessment, it is the uncontroverted evidence of the President that without a substantial payment to EPCOR the power to the building was to be disconnected. The Condo Corp did not have adequate funds to satisfy EPCOR's demands. At that point there may not have been financial statements or budgets in place to assist the Board but one can think of few more compelling reasons for requiring a special assessment. If an Owner is aggrieved or believes that the Board

has acted improperly, he may bring an application under S.67 of the Act. That, however, does not relieve the Owner from paying his assessment until the issues raised are determined unless the parties agree or the Court orders otherwise.

Interest and Costs

[25] Section 40(1) of the Act permits interest to be charged on any unpaid contributions by an owner. Costs are governed by s.42 of the Act. Both costs and interest are addressed in the Bylaws.

[26] Bylaw 4.09 and 4.10 read as follows:

4.09 PENALTIES AND INTEREST

409.1 The Board may specify penalties for infraction of By-laws and Rules, and interest charges for non-payment of assessments when due. Penalties for infraction of By-laws may not exceed Two Hundred (\$200.00) Dollars per occurrence and interest on arrears of assessments, or any other monies due to the Corporation, may not be exacted at a rate in excess of eighteen (18%) percent per annum, and not compounded.

40.9.2 No Owner is exempted from liability for contributions towards the Administrative expenses by waiver of use or enjoyment of the Common Property, or by vacating or abandoning the Unit. Legal expenses incurred by the Corporation in the collection of assessments shall be paid by the Owner in default on a solicitor and his own client basis.

40.10 REMEDIES FOR NON-PAYMENT OF ASSESSMENTS

40.10.1 The Corporation shall and does have a lien and charge upon and against the estate of any Owner for any unpaid assessment, installment or payment due to the Corporation.

40.10.2 The Corporation may file a caveat against the title of a Unit whose Owner is in default of payment.

40.10.3 The Corporation shall be entitled to be paid by the defaulting Owner on an indemnification basis for all costs incurred in preparing, registering and discharging the caveat, and shall not be obligated to discharge any caveat until all arrears of the Owner, including interest and all legal costs are fully paid.

40.10.4 Proceedings required to be taken by the Corporation to enforce its rights secured by caveat shall be payable by an Owner on a solicitor and his own client indemnification basis.

4.10.5 Nothing in these By-laws shall restrict or abrogate any rights or remedies given to the Corporation by or under the Act.

[27] With respect to interest although both the Act and the Bylaws authorize the charging of interest, there is no evidence to show that the Board has ever specified a rate of interest by resolution. Under the circumstances prejudgment interest under the Judgment Interest Act is appropriate but I agree should be suspended on the increased amount of the regular assessment and on the amounts of the special assessment from October 6, 2008 to December 10, 2010 being the period when documents were requested and undelivered by the Condo Corp.

[28] Section 42(1) permits the Condo Corp to recover from the person against whom steps were taken all reasonable costs including legal expenses in collecting the amount owing for condominium contributions. Despite language in Bylaws 4.09 and 4.10 which purports to expand liability for costs, I am of the view that the Act governs. Costs on a solicitor and client basis are payable for the action only. Legal expenses are not permitted by s.42(2) for preparation, registration, enforcement and discharge of the caveat but only reasonable expenses may be recovered. Those expenses must be claimed as part of the action with the appropriate evidence. Outstanding contributions constitute a charge against the property under s.39(7) and interest is deemed a charge by virtue of s.41. Legal costs are not given the same characterisation under the Act. Despite wording in the Bylaws which purport to capture legal costs as a charge under their caveat, the Act governs.

CONCLUSION

[29] The Plaintiff Condo Corp shall have a declaration for the amounts outstanding for contributions to the date set out in their evidence and interest as prescribed above. They shall also have their solicitor and client costs for the action thus far however the costs of this application will be reduced by 25% to reflect the thrown away costs of the Defendant arising from the late withdrawal of the claim for electricity. The redemption period for contributions and interest shall expire six months from the date of this decision. The stay shall not apply to the legal costs awarded (subject to assessment) as they constitute an *in personam* judgment and collectible as such. Matters pertaining to electricity, costs of the caveat and the counterclaim are adjourned to an unspecified date.

Dated at the City of Edmonton, Alberta this 21st day of October, 2011.

L.A. Smart
M.C.C.Q.B.A.

Appearances:

Jerritt Pawlyk
Bishop & McKenzie
for the Plaintiff

Dennis R. Schmidt
Fraser Milner Casgrain LLP
for the Defendant