Court of Queen's Bench of Alberta

Citation: Condominium Corporation No 0213865 v. Uhrik, 2014 ABQB 478

Date: 20140807
Docket: 1101 02684
Registry: Calgary

Between:

Condominium Corporation No 0213865

Plaintiff / Defendant by Counterclaim

- and -

Tibor P Uhrik

Defendant / Plaintiff by Counterclaim

Memorandum of Decision
of
Andrew R. Robertson, Q.C., Master in Chambers

Overview

[1] When can a condominium owner avoid or delay paying his share of a special assessment? In this case the owner brought a counterclaim and says that the condominium corporation's rights against his unit should not be enforced until the trial of his counterclaim has been heard, although he has taken no meaningful steps to advance his claim.

[2] This claim arises out of special assessments that were found to be necessary because of leaks in the condominium building envelope. The board of directors levied a special assessment to obtain a report on what repairs were required and a second special assessment for the cost of the substantial repairs. For about three years the defendant (plaintiff by counterclaim) has fought the claim.

[3] The condominium corporation now seeks summary judgment for the amount owing under the special assessments. The owner opposes the application and argues that the claim for special assessments should be tried with his counterclaim.

[4] He has objected to paying his proportionate share (calculated using unit factors) for a number of reasons. He wanted more information; he questioned whether the amount of the assessments were appropriate, and pointed to the fact that there was a significant refund after the work was done; he now says that he was defamed because, he believes, a representative of the condominium corporation spoke to his bank and interfered with his ability to borrow the money to pay the special assessments, although as discussed below this is a recent assertion.

[5] To advance his claim, he has brought a counterclaim. Effectively no steps have been taken in the counterclaim other than amending it twice. There has been no affidavit of records delivered by him (and none by the condominium corporation), although the lawsuit has been ongoing for about three years.

Facts

The General Background

[6] The problem arose in 2010 when the condominium corporation Board of Directors issued a special assessment for $1 million, prorated according to unit factors, for the cost of a report to determine the extent of damage and the cost of repairs arising from leaking through the building envelope. The problem became worse when by letter of May 19, 2011 the condominium board of directors advised that a further special assessment in the total amount of $5,500,000 had been assessed to carry out the repairs.

[7] The total cost to the defendant for these special assessments was $87,100. After the repairs were completed, it was determined that there was an overage in the amount assessed and a refund was arranged by court order. The refund to the credit of the defendant was $17,420.

[8] The fact that there was a refund was not necessarily a surprise, because the assessment for the repairs was grossed up by 20% ($928,000) for "Contingency" and there was an additional amount of $50,000 set aside for "Contingency". That was set out in some detail in an attachment to the letter of May 19, 2011 from the Board of Directors.

[9] The defendant complains that he was not given advance notice, so the special assessments were a surprise, and that the amount of the special assessment was over 40% of the total value of his unit. However, his counsel concedes that the decision was made by the Board of Directors, not by the owners at a general meeting, and so he was not entitled to notice of the meeting when the decision was made.

[10] The need for the special assessment would have been a surprise to all concerned. If it were not a surprise it would have been factored into the capital replacement reserve fund. Special assessments are always a surprise.

Delay, Costs and Interest Rate

[11] The defendant complains of delay by the condominium corporation for not moving forward the foreclosure proceedings, and argues that the condominium corporation should be denied its claim for interest because of the delay and for other reasons. He also argues that the condominium corporation should not be entitled to solicitor and client costs, if it is otherwise successful, even though the bylaws provide for them.

[12] Some of the delay, at least, resulted from the fact that his counsel presented an unfiled affidavit the morning of one application. Some of delay results from the fact that the summary judgment application was referred to a special application and some months passed waiting for the matter to come before the court. Some delay is attributable to an eight month period between cross-examination of the plaintiff's deponent and the delivery of replies to undertakings.

[13] However, the defendant has resisted this claim, and has taken no steps to advance his counterclaim for defamation or the other claims he makes. He has not delivered an affidavit of records, and has not provided any meaningful affidavit evidence in support of his counterclaim to demonstrate that any trial whatsoever is necessary. In cases where the court has directed that the counterclaim be tried with the main claim there is some reason to believe that there is merit in both claims (or at least one party is not arguing that the other party's claim has no merit at all, which is the case here) and they are closely connected.

Interest Rate Concerns

[14] He also argues that the interest rate claimed by the condominium corporation, which is 18% per annum compounded monthly, is not allowed by the regulations under the *Condominium Property Act*, RSA 2000, chapter C-22. Regulation 76 says this:

> The rate of interest that may be charged by a corporation under section 40 of the Act on any unpaid balance of the contribution owing to the corporation by an owner shall not be greater than 18% per annum.

[15] There is no provision for compounding, and in the absence of any such provision, the interest must be simple interest – without any compounding.

[16] However, the bylaws of this condominium corporation provide for the payment of interest, and they define "Interest Rate" as "18 per cent per annum calculated and compounded monthly". Accordingly, the interest rate set by the bylaws, once the compounding is taken into account, exceeds the amount permitted under the regulation.

[17] It is the position of the defendant that the interest rate should be the interest rate prescribed under the *Judgment Interest Act*, RSA 2000 chapter J – 1. That rate is prescribed annually, and the rate for 2014 is 1.10%, simple interest. However, subsection 2 (3) of the *Judgment Interest Act* provides as follows:

> If it considers it just to do so having regard to changes in market interest rates, the circumstances of the case or the conduct of the action, the court may
>
> (a) refuse to award interest under this Part,
>
> (b) award interest under this Part at a rate higher or lower than the rate set out in this Part, or
>
> (c) award interest under this Part for a period other than the period provided for in this Part.

[18] It is the submission of counsel for the condominium corporation that interest that should be awarded at 18 per cent, without compounding, on the basis that the condominium corporation simply exceeded (probably because of error) the maximum amount permitted by the regulation under the *Condominium Property Act*. Accordingly, the interest rate setting the bylaw should be read without the words directing that the interest be compounded.

The Counterclaim

[19] The amended amended counterclaim, which was filed March 26, 2014 sets out in the first eight paragraphs various complaints about what the Board of Directors did in levying the cash call.

[20] In paragraph 9 the owner makes an allegation about a contract for natural gas which, "negligently and improvidently locked the plaintiff by counterclaim into a five year rate notwithstanding that the rates were trending down and/or ended up trending down such that the current rate is considerably lower than the rate at which the defendant by counterclaim locked in." This allegation has nothing to do with the special assessment.

[21] In paragraph 10 he alleges that the condominium corporation caused harm to the relationship of the plaintiff by counterclaim with his bank by uttering "false, malicious, slanderous, defamatory and injurious statements including stating that [he] failed to pay his monthly condo fees and property taxes thereby impairing, or potential impairing, [his] credit worthiness and thereby damaging his relationship with the HSBC". There is no detail given as to who spoke to whom, when, or what was said, other than the general allegation that is quoted.

[22] The claim for defamation, first advanced in March 2014, suggests that the alleged defamatory communications must have been made long after the action was started and defended (although with no particulars we are left in the dark). That, in turn, suggests that the claim and cross-claim are not very closely connected.

[23] There has been some conflict between the plaintiff and defendant about the payment of regular monthly condominium fees, relating apparently to the fact that once a matter has been referred to legal counsel for collection, the property manager directs all further payments to its lawyer, to avoid confusion. The defendant apparently sent funds that were not credited. Possible reasons for this were raised by the defendant's counsel in questioning (pages 10 to 13). Regular monthly condominium fees are not part of the condominium corporations current application.

[24] Paragraph 11 of the amended amended counterclaim complains that the condominium corporation failed to deliver a letter that he requested for the benefit of his bank "confirming that no further cash calls would be made for further repairing the building." This has been referred to as a "comfort letter".

[25] Counsel for the defendant/plaintiff by counterclaim candidly admitted that there is no specific duty on a condominium corporation to give a "comfort letter".

A Volunteer Board of Directors Manages a Condominium Corporation

[26] Leaky condominiums are an unfortunate fact of modern life. Errors made in the construction of any home, whether a single family dwelling, a semi-detached home, apartment building, a townhouse, or any other form of dwelling structure, often do not manifest themselves for years. Expensive repairs that are required as a home ages are an unpleasant reality for homeowners, whether the home is a condominium unit or not. The nature of condominium ownership places the decision to repair, when, and how, in the hands of an elected board of volunteer directors, usually with the support and guidance of a management company, and sometimes their decisions are not happy ones. They must decide what is to be done, what contractor is to do it, and how much money must be raised to make sure the work can be paid for, so builders' liens are not registered against everyone's unit. They may seek input from the other owners, but the obligation rests with the Board.

[27] In this case, the Board of Directors consisted, I am told, of six members, all of whom are owners of units in the condominium. There are 66 units in the condominium in total. Accordingly, almost 10% of the owners are on the Board of Directors, and in levying the special assessment they were levying a special assessment against themselves, as well as the other 60 owners. The facts are quite clear that this was not a step that was taken to harm the defendant; rather it was a step taken to protect the interests of the defendant as well as the interests of all of the other owners, by making repairs before the building deteriorated beyond the point of repair.

[28] While the fact that more money was assessed than was actually required may be upsetting to the defendant, that fact may also reflect good management. When a special assessment of this magnitude is made, the members of the Board of Directors do not know at the time of making the special assessment how many will respond favourably with a cheque at the appropriate time or times (here the payments here were spread out over time as funds were required, rather than one lump sum being required). With that in mind, and with the clear knowledge that when attempting any sort of significant renovation or rehabilitation of a building the actual cost will not be known until work is at least well underway, it is prudent business practice to factor in a contingency.

[29] However, the unknown may go both ways. The ultimate cost may be higher than the amount originally projected, or it may be lower. Here, the condominium corporation seems to have been lucky: the ultimate cost ended up being lower than the amount originally projected. Most would consider that a fortunate circumstance, not evidence of mismanagement.

Issues

[30] In oral argument the defendant's legal counsel candidly admitted that it seems likely that his client will have to pay his share of the special assessment. The issues that require determination are the following:

1. Whether or not judgment should be granted, and a redemption order made, prior to the trial of the counterclaim.

2. Whether interest should be awarded at 18% simple interest, the amount prescribed under the *Judgment Interest Act*, or some other rate directed by the court.

3. Whether costs should be awarded to the condominium corporation on the basis of party and party costs or on the basis of solicitor client costs.

[31] The net amount claimed for the special assessment (after deducting the refund) is $69,680. The amount claimed for interest is in excess of $50,000. Accordingly, the amount claimed at this stage is in excess of $120,000.

Analysis

Issue #1 – Whether the Claim Should Wait for the Counterclaim

[32] In order to determine whether the main claim should wait for the counterclaim a review of the claim advanced in the counterclaim, and what evidence there is to support it, is required.

Defamation and Natural Gas Contract Claim

[33] In a claim for defamation, particulars have long been required, and Rule 13.7(f) specifically requires particulars in a defamation claim. None have been provided in the pleading or otherwise. No evidence whatsoever has been presented on behalf of the defendant to support his counterclaim for defamation. He simply alleges that he has one, and that the claim against him should be held up pending the trial on his counterclaim.

[34] As well, no evidence at all is presented about the natural gas contract.

Other Claims

[35] The owner's affidavit of December 15, 2013 does provide some evidence of his complaint. He sets out:

(a) his complaint about the special assessment;

(b) that he was not notified of the meetings that took place regarding the special assessments;

(c) that the total assessments represented nearly 45% of his unit value at that time;

(d) his request for the "comfort letter";

(e) his request for details of the allocation of the special assessment as between required repairs and unnecessary redesign work (but there is no evidence of any of the special assessment being spent on "redesign work");

(f) his belief that the deficiencies in the building envelope resulted from faulty and inappropriate materials, faulty workmanship and faulty inspections by the City of Calgary (which is not relevant to this claim and is the subject of a separate claim that I am told is being advanced by the condominium corporation against others);

(g) he notes that the value of his unit is no longer $215,000, as it was at the outset, but is now $329,000 after the completion of the repairs;

(h) he believes that others have lost their units to foreclosure as a result of inability to pay the special assessment;

(i) his concern that the condominium corporation knew from the outset that "they did not require all the funds assessed";

(j) a complaint about not receiving undertaking responses until August 7, 2013 on questioning that occurred December 7, 2012; and

(k) that he wants to see the legal accounts on which the solicitor and client claim is advanced.

[36] Some of these complaints have been discussed above. Many of them have obvious responses.

[37] His complaint about not being provided sufficient details of the allocation of the special assessments between required repairs and unnecessary design work requires, as a condition precedent to giving it any meaningful consideration, at least some evidence that there was any unnecessary redesign work, and there is not.

[38] His complaint about the cause of the deficiencies being faulty construction and inspection may be legitimate, but are not relevant to this application. The condominium corporation is taking proceedings against the parties it believes are liable.

[39] The fact that others have been unable to pay their share of the special assessment is a concern on a humanitarian level, but not relevant to the legal issues before the court.

[40] The fact that the special assessment was for more money than was actually required is not something that can be taken into account in the absence of some evidence of deliberate mismanagement by the condominium corporation, and there is none, other than the assertion that the damage claim advanced against others was only $4,000,000 while the repair special assessment was $5,500,000.

[41] The concern about the delay in responding to undertakings is a matter that may be relevant to solicitor client costs and might give some traction to an argument that the interest claim should not be awarded without a reduction, although the magnitude of the undertaking responses suggests that eight months was not an abnormal delay. But the undertakings were answered in August, 2013, 12 months ago, and the defendant has not taken any steps to advance his counterclaim except to amend it a second time. Who is guilty of delay?

[42] His concern about the legal accounts is something that can be addressed in a review (previously called a "taxation") after costs have been awarded. That is, the concern is premature.

The Options Available

[43] There are a variety of options available when a court addressees a clear claim for debt, summary judgment is sought, but there is a counterclaim for damages that arise out of either the same, or a related, or an unrelated, incident:

(a) sometimes judgment is granted, and the counterclaim is severed and directed to proceed by way of separate hearing;

(b) sometimes judgment is granted, but stayed, pending the outcome of the counterclaim (former Rule 159(4) as well as Rule 98 specifically provided for this, and current Rule 1.4(2)(h) maintains the option); or

(c) time is given for the plaintiff by counterclaim to post security for the entire claim, in which case the claim will be stayed, failing which the judgment will become enforceable (for example, *Ideal Basic Industries Inc. v. Gill*, 47 C.P.C. 195 (B.C.C.A. 1984).

[44] Where it is argued that the summary judgment should be stayed, whether upon providing security for the plaintiff's claim or otherwise, some cases say that the *American Cynamid* test should be employed, such as *Desautels Creative Printing Papers Inc. v. Printcrafters Inc.*, 1999 CarswellMan 472, [1999] M.J. No. 453 (Man. C.A.), which requires the court to review:

(a) whether the applicant has an arguable case that the judgment is wrong,

(b) whether the applicant will suffer from irreparable harm if the stay is not granted, and

(c) whether the harm to the applicant from refusing the stay is greater than the harm to the respondent from granting one.

[45] In the case of an application for a stay pending trial on the counterclaim, the first test effectively would be whether there is an arguable case in the counterclaim. The defendant here has not formally asked for a stay – the case was argued on the basis that summary judgment should not be granted – but he would stumble on all of the tests, as there is no meaningful evidence in support.

[46] When the plaintiff is not otherwise being granted summary judgment, the claim and a counterclaim that are related are simply directed to go to trial together. The last option is usually chosen when the claim and the counterclaim are closely connected - and the court concludes that the set-off claimed is so closely related to the main claim that summary judgment is not awarded on the main claim, as was the case in *Johnston Terminals Ltd. v. LGR Business Consultants Ltd.*, 48 A.R. 281 (Alta. M.C. 1983), cited by the defendant.

[47] Has the approach changed recently? Perhaps it has. The general direction given by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 and the decision of the Alberta Court of Appeal in *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 implore the lower courts to consider summary judgment applications carefully and determine whether a decision can be made on the record.

[48] Furthermore, Rule 7.3 makes it clear that summary judgment can be granted for part of a claim, even when there is not a counterclaim, where that part of the claim is clear, and the court can refer the remaining claim to trial. Here the obligation to pay the special assessment is clear. The claim advanced in response is a damages claim that, if successful, would require a separate payment or set-off, not a proper reduction in the special assessment. The assertion about the natural gas contract is completely unrelated. The claim of defamation, first advanced in March of 2014, apparently arose long after the special assessment was levied.

[49] Under Rule 7.3 it is clear that on a summary judgment application to the extent possible judgment should be granted, and the issues narrowed, where the record is clear and it is just to do so.

[50] Rule 3.58 makes it clear that a counterclaim is a separate action. The defendant here is, in essence, asking that the debt claim against him wait until his separate action, for tort relief, is decided, although he has done nothing to move it forward except to amend it twice since he filed his counterclaim initially almost three years ago and he tenders no evidence of consequence (discussed above) to establish that he has a valid claim.

[51] In the meantime, his neighbours have paid for the cost of repairs, and they have (through the condominium corporation) a claim that gives a remedy against his unit.

[52] We have been told repeatedly by the superior courts that on summary judgment applications each party is to put its best foot forward: *Trans-America Life Insurance Company Co. v. Canada Life Assurance Co.*, 28 O.R.(3d) 423 at page 434, for example. That means providing evidence, or pointing to something in the opponent's evidence, demonstrating that there is something to be sent to trial. There is no meaningful evidence here that anything is required for trial on the counterclaim.

[53] The claim for relief relating to the special assessment owed by the defendant is allowed. In all the circumstances of this case, in my discretion I decline to stay the proceedings commenced by the condominium corporation for the enforcement of their assessment based upon the existence of the counterclaim. The remedy sought, a redemption order, has a built-in stay in

any event – the redemption period itself, which in this case will be six months from the date of these reasons.

[54] However, no specific application was brought to summarily dismiss the counterclaim (except as first requested in the applicant's brief). Accordingly, I do not strike out the counterclaim. Rather, I leave it in place but it will not affect the resolution of the claim by the condominium corporation against the defendant.

Issue #2 – The Interest Rate

[55] In respect of the interest claim, the argument put forward by the defendant, to the effect that the interest rate that should be awarded should be the prescribed rate under the *Judgment Interest Act* might be persuasive in the case of a simple debt collection. The argument is that if the interest rate in the agreement (in this case the bylaws) is void then the creditor should be held to the statutory remedy and regulation.

[56] However, in the context of this case the inference that I make is that any other owner that did not make their payment on time was charged interest at 18% compounded monthly. Counsel for the defendant has quite properly pointed out that that exceeds the maximum limit under the regulations made pursuant to the *Condominium Property Act*, but it does not follow that he should get a "special deal" because he has put the condominium corporation to such effort to collect the special assessment.

[57] Pursuant to the provisions of the *Judgment Interest Act*, in all the circumstances I exercise my discretion to direct that interest is payable at 18%, without compounding, for these reasons:

(a) that is the maximum permitted under the regulations,

(b) it reflects the obligation placed on the other owners,

(c) in general terms it reflects what I understand condominium corporations in Alberta generally charge in their bylaws, and

(d) condominium corporations are not in the business of lending money to their individual owners, as discussed in the next paragraph. The money is not advanced willingly, and all owners are expected to pay their share or the corporation will become insolvent.

Issue #3 – The Appropriate Level of Costs

[58] In respect of the claim for solicitor and client costs, this is expressly provided in the bylaws. It has been claimed from the outset. This is a cooperative-owned building where, he has placed an unfair burden on the remaining owners by forcing the other owners to fund the underlying repair costs while also forcing them to incur legal fees to collect his share of those costs. This is not a financial institution that lent money with the risk of not being able to recover it; it is not a business servicing its customers who chose to take on the risk of credit. The plaintiff here is a collective of the defendant's neighbours, who are entitled to be treated fairly.

[59] In the circumstances of this case, they are entitled to have solicitor and client costs paid by the defendant in accordance with the terms expressly set out in the bylaws. There is no reason for the exercise of any discretion not to follow their "social contract" as expressed in the bylaws.

Conclusion

[60] A redemption order will be granted, in the template form modified as necessary.

[61] The redemption order will include a six month redemption period from the date of these Reasons, during which time the defendant can move his counterclaim forward.

Heard on the 17th day of July, 2014.
Dated at the City of Calgary, Alberta this 6th day of August, 2014.

Andrew R. Robertson, Q.C.
M.C.C.Q.B.A.

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