

Case Name:

Condominium Plan No. 022 1347 v. N.Y.

Between

The Owners: Condominium Plan No. 022 1347,
respondent, and
N.Y., appellant

[2003] A.J. No. 1227

2003 ABQB 790

Action No. 0303 11057

**Alberta Court of Queen's Bench
Judicial District of Edmonton
Lee J.**

Heard: September 11, 2003.

Judgment: September 18, 2003.

Filed: September 19, 2003.

(83 paras.)

Counsel:

Patrick T. Miranda, for the appellant.

Colleen G. Dunlop, for the respondent.

REASONS FOR JUDGMENT

LEE J.:—

OVERVIEW

¶ 1 This appeal is brought pursuant to Rule 499 of the Alberta Rules of Court and s. 12 of the Court of Queen's Bench Act with respect to an application brought forth by the Respondent, the Owners: Condominium Plan No. 022 1347, whereby an Order was granted by Master Breitkreuz directing that the Appellant vacate the premises on July 15, 2003 without further order, for failing to comply with the associated bylaws of the Condominium Plan No. 022 1347.

¶ 2 I have decided that an owner of a condominium residence can be evicted by the Condominium Association for substantial breaches of the Condominium Bylaws, just as if she was a tenant. In this case the Appellant was basically a tenant in any event, or holding the property as a constructive trustee. However even if she was the owner of the condominium unit at all times, she could still be evicted by her Condominium Association in these circumstances.

¶ 3 All owners of condominiums are required to obey the Condominium Bylaws, and give up the right to do as they choose in their homes given that their unit ownership is in common, and in cooperation with others. As long as the bylaws are strictly construed against the Condominium Corporation, owners will otherwise not be allowed to disrupt the common scheme by their individual actions in breach of the contract they have entered into with the other owners as signified by the bylaws.

QUICKLAW

INTRODUCTION

¶ 4 On April 17, 2003 the Appellant was given an Eviction Notice pursuant to s. 54 of the Condominium Property Act R.S.A. 2000 c.C-22(the "C.P.A.") in response to a series of alleged breaches of the Condominium Bylaws which occurred between November 2003 and June 2003. The Appellant was required to vacate the Condominium by May 31, 2003.

¶ 5 On June 13, 2003 the Appellant became the registered owner of the condominium.

¶ 6 On June 19, 2003 the Respondent commenced an application pursuant to s. 55 of the C.P.A. seeking a court ordered eviction of the Appellant.

¶ 7 This initial court application was heard on July 2, 2003, and was uncontested, as the Appellant did not appear in her own defence or retain legal counsel.

¶ 8 The Master granted an order directing the Appellant to deliver up vacant possession of the premises without further order, for failing to comply with the associated Bylaws of the Condominium Plan No. 022 1347.

APPEAL GROUNDS

¶ 9 The grounds of the appeal raised by the Appellant are as follows:

- (i) The Master exceeded his jurisdiction by failing to properly interpret the Condominium Property Act with respect to the available remedies against a Condominium Unit Owner;
- (ii) The Master exceeded his jurisdiction by granting a remedy that was not available under the C.P.A.; and
- (iii) Alternatively, if the Master did not exceed his jurisdiction by doing so, then he erred at law or equity by misapplying any discretionary power vested in him by the said Act through the imposition of a remedy that was excessive, improper, unfit and/or inequitable in the circumstance, having regard to the status of the Appellant as a condominium unit owner at the time in question.

ANALYSIS

¶ 10 It is submitted that the Master erred in law in his interpretation and/or analysis of the Condominium Property Act and more specifically, the definitions contained therein.

¶ 11 It is submitted that the Master failed to properly consider the status of the Appellant as that of an owner rather than that of a tenant.

¶ 12 Moreover, as a result of this error, it is submitted that the Master granted a remedy, which was not available or inapplicable as against the Appellant.

¶ 13 The Condominium Property Act defines an "owner" as:

A person who is registered as the owner of:

- (i) The fee simple estate in a unit, or

- (ii) The leasehold estate in a unit when the parcel on which the unit is located is held under a lease and a certificate of title has been issued under section 5(1)(b) in respect of that lease".

¶ 14 The Condominium Property Act does not specifically contain a definition of a "tenant".

¶ 15 The Appellant submits that where a piece of legislation does not define a particular term, the regular dictionary definition applies.

¶ 16 The Carswell Dictionary of Canadian Law defines a "tenant" as:

a "person who, by reason of his possession of occupancy or his rights thereto, whether by privity of contract or estate, for the time being holds the premises under title immediately or mediately from the landlord or his predecessor in title, and by reason or his so holding is the person liable for the time being to pay the rent.

¶ 17 It is submitted that since the Appellant became the owner of the unit in question as of June 13, 2003 the Master could not grant an Eviction Order as against the Appellant as a tenant, pursuant to s. 54 of the C.P.A..

¶ 18 It is submitted that the C.P.A. does not contemplate the specific remedy of eviction against a condominium unit "owner".

¶ 19 The provisions of the C.P.A. which deal exclusively with court ordered eviction proceedings are found in s. 55, which reads as follows: -

- s. 55 If a tenant if given notice under section 54(1) and does not give up possession, the corporation or the landlord may apply by originating notice to the Court for an order requiring the tenant to give up possession of the unit.

¶ 20 The Appellant submits that s. 55 of the C.P.A. solely contemplates eviction procedures for residents who are classified as "tenants".

¶ 21 The Appellant argues that the Respondent Condominium Association was made aware of the intent to transfer the property as of June 10, 2003, and that the Appellant had ceased paying rent and no longer maintained the residence in the capacity of a "tenant".

¶ 22 However, prior to the eviction proceedings, the Appellant was a tenant, and had been served with an eviction notice pursuant to s. 54 for failing to comply with various Condominium bylaws.

¶ 23 The Appellant argues however that the Respondent then allowed the Appellant to remain in the premises for nineteen days beyond the date listed in the eviction notice without taking further enforcement action.

¶ 24 The Appellant argues that by virtue of the Appellant's acquisition of title, the Respondent lost the opportunity to commence a court ordered eviction of a "tenant".

¶ 25 It is also argued that the Respondent received notice of the intention to acquire title (on June 10, 2003), yet still failed to initiate any enforcement proceedings until June 19, 2003.

¶ 26 It is therefore submitted that the Respondent failed to commence appropriate proceedings against the Appellant during the time period in which she maintained "tenant" status.

¶ 27 It is submitted that Sections 54 to 56 of the C.P.A. would only be applicable to the Appellant during the time that she was still classified as a "tenant".

¶ 28 Therefore it is submitted that as the Appellant could not be evicted under s. 55 of the C.P.A. at the time the application in question was brought before the Master, any order granted as against the Appellant as an "owner" must be found to be outside the scope of the legislation and thus void ab inito.

¶ 29 Finally, the Appellant argues that the Master did not have the residual authority to order up the vacant possession of the unit in question by virtue of an discretionary power granted within any other section of the C.P.A..

¶ 30 It is submitted that the remedial powers granted within s. 67 of the C.P.A. are to be given the most stringent application pursuant to s. 13 of the Interpretation Act, and the strictures of law and equity.

¶ 31 Section 13 of the Interpretation Act reads as follows: -

s. 13 Definitions and other interpretation provisions in an enactment

- (a) are applicable to the whole enactment, including the section containing the definitions or interpretation provisions, except to the extent that a contrary intention appears in the enactment, and
- (b) apply to regulations made under the enactment except to the extent that a contrary intention appears in the enactment or in the regulations.

¶ 32 It is submitted that although framed quite broadly, s. 67 of the C.P.A. should not have been construed so as to permit a Master to grant the extraordinary remedy of "evicting an owner" given that "eviction" generally was dealt with elsewhere in the legislation, and was specifically limited so as to apply only as against "tenants".

¶ 33 Moreover, it is submitted that s. 67 of the C.P.A. specifically contemplates alternative remedies which are less extreme and more in accordance with the property/ownership rights of the individual unit holders.

¶ 34 These alternative remedies include: -

- a) Directing that the person carrying on the improper conduct cease carrying on the improper conduct;
- b) Giving directions as to how matters are to be carried out so that the improper conduct will not re-occur or continue;
- c) Awarding compensation to the Respondent for any losses incurred by the improper conduct; and
- d) Awarding costs.

¶ 35 It is submitted that if the Master chose to exercise his discretionary power under s. 67 to and grant a remedy therein, such remedy ought to have been consonant with rights of a unit owner.

¶ 36 Additionally, given that the Master failed to consider the availability and applicability of other remedies

available, including those outside the legislation (for example under s. 85 of the Bylaws of Condominium Plan No. 022 1347), or any of the alternate remedies contemplated by s. 67 of the C.P.A., that the exercise of his discretion to "evict" the Appellant was excessive and thus without merit.

¶ 37 In this case however many complaints were verbally communicated to the Corporation and the Property manager about the behaviour of the tenant/owner of this Condominium.

¶ 38 Twenty-three written complaints were also received. These complaints were regarding: -

- (a) Noise coming from the premises at times of the day and to such an extent that the peaceful enjoyment of the building for other owners, occupiers or their visitors was unreasonably disrupted;
- (b) The Appellant obstructing, or permitting obstruction of sidewalks, walkways, passages, driveways, gateways, or parking areas for purposes other than for entering and leaving the premises;
- (c) Damage to the common property by pets in the care or control of the Appellant;
- (d) The Appellant failing, or permitting her visitors or other occupants not to clean up after, or pick up the excrement of any pets in her care and control;
- (e) The Appellant failing to keep pets in her care and control on a leash at all times;
- (f) The Appellant speaking in a derogatory or rude manner to other owners, occupants, or their visitors, and
- (g) The Appellant trespassing or permitting trespass by her visitors or other occupants, into parking areas that other owners are entitled to use and occupy exclusively;

¶ 39 It appears that these complaints involved breaches of the Condominium Bylaws of The Owners: Condominium Plan No. 022 1347.

¶ 40 The Appellant and her parents were informed of the aforementioned complaints and breaches on a number of occasions, including by way of letters dated January 9, 2003, February 4, 2003 and March 12, 2003.

¶ 41 On April 17, 2003, the Appellant and her parents were served with a Notice of Termination of Tenancy under Section 54 of the C.P.A. based on the breaches.

¶ 42 The tenancy was terminated on May 31, 2003. The Appellant failed to give up vacant possession of the premises, and continues to reside in the premises.

¶ 43 The Appellant and her parents were aware that enforcement of the eviction was proceeding. The Appellant's father had a conversation with Bishop & McKenzie LLP on June 4, 2003 advising them that the property would soon be sold, and wrote Bishop & McKenzie LLP letters on June 4, 2003 and June 10, 2003 regarding the eviction.

¶ 44 Title of the premises was transferred to the Appellant by her parents on or about June 10 to 13, 2003.

¶ 45 The purchase price paid by the Appellant to her parents appears to be approximately \$67.00, as that is the price that appears on the Transfer of Land for the Premises. The consideration is listed as "nil" on the title for the premises.

¶ 46 The Condominium was valued at \$140,000.00 on June 13, 2003.

¶ 47 Proceedings to evict the Appellant as an "owner" of the premises, not under s. 55 of the C.P.A., were commenced on June 19, 2003 by way of Originating Notice.

¶ 48 The Appellant had notice of this application, and chose not to attend before the Master.

¶ 49 The Appellant chose to continue to contravene the bylaws, and to commit further breaches after she was an "owner", and after notification of the application for the eviction.

¶ 50 On July 2, 2003 the Master, on the basis that the Appellant was an "owner", ordered that she deliver up vacant possession of the premises by July 15, 2003.

¶ 51 She failed to do so, and she also failed to appeal the Order during the time permitted by the Alberta Rules of Court.

¶ 52 On July 15, 2003, the date that the Appellant was ordered by the Master to deliver up vacant possession of the premises, she applied, and was granted leave, to extend the time for filing an appeal, and she has now appealed.

CONCLUSION

Bylaws of Condominium Plan 022 1347

¶ 53 Owners and anyone in possession of a condominium unit are bound by, and shall observe and obey the Bylaws.

* Section 37, Condominium Bylaws of the Owners:

Condominium Plan No. 022 1347

* Section 32, C.P.A.

* Condominium Plan No. 9524710 v. Webb (1999) 236 A.R. 364 [Q.B.]

¶ 54 Bylaws regulate the corporation and provide for the control, management and administration of the units, the real and personal property of the Corporation, and the common property.

* Section 32, C.P.A.

¶ 55 The Bylaws in this case mandate that: -

- (a) An owner, their families, guests, tenants, and visitors shall not make or permit any disturbing noise or smell on the condominium unit or common property, or do or permit anything to be done therein which, in the opinion of the Board or the Manager, will interfere with the rights, comforts or convenience of other occupants of the building, their families, guests, tenants, visitors and persons having business with them;

- (b) An owner shall not keep any animals in or on any unit or in the common property other than the pets authorized by these Bylaws;
 - (c) No animal of any kind exceeding 50 pounds shall be kept in any unit unless approved by the Condominium Board;
 - (d) All pets which may bear a leash are required to wear one on the common property or any unit registered to the Corporation, and no pet shall be kept on or allowed to run at large over any part of the common property or any unit registered to the Corporation, or on any unit unless within an enclosed area on the unit;
 - (e) Visitors must park in a parking stall designated by the Board as visitor parking, and any parking stall and plug-in facilities assigned to any condominium unit by the Board are for the sole use of the owner of such unit;
 - (f) Sidewalk, walkways, passages, driveways, gateways and parking areas shall not be obstructed by any owner, his family, guests, tenants, or visitors or used by them for any other purpose than for entering and leaving their respective condominium unit. Parking areas shall not be used for any purpose other than the parking of motor vehicles, and no owner shall trespass in any parking areas which they are not entitled to use and occupy exclusively; and
 - (g) Owners and their families, guests, tenants, visitors and pets of those persons shall not harm, mutilate, destroy, waste, alter, or litter any part or parts of the common property or any unit or the property (real or personal) of the Corporation, including without limitation, any landscaping work (including trees, grass, shrubs, hedges, flowers, and flower beds).
- * Sections 47, 57, 61, 68, 71, 72 and 73, Condominium Bylaws of The Owners: Condominium Plan No. 022 1347

¶ 56 The Appellant appears to be in violation of all of the aforementioned Bylaws.

¶ 57 Murray J. in Condominium Plan No. 9524710 v. Webb, supra adopted the reasoning of the District Court of Appeal of Florida in Sterling Village Condominium Inc. v. Breitenback (1971) 251 So.2d 585 that a person's right to do as they choose in their home must yield, at least in degree, where ownership is in common or cooperation with others. Individuals ought not to be permitted to disrupt the integrity of the common scheme.

¶ 58 Section 85, Condominium Bylaws of The Owners: Condominium Plan No. 022 1347 states that the Corporation can take any action, without restriction, with respect to an infraction, violation or default of the Bylaws by an owner, his invitees or tenants.

¶ 59 The Corporation chose to take action on the breaches.

¶ 60 Condominium Plan No. 932 2887 v. Redweik [1994] A.J. No. 1020 [M.C.] decided that the Court should not become involved in adjudicating on the reasonableness of the bylaws, nor on questions of how the board enforces the bylaws.

¶ 61 This is a correct proposition in law assuming that the Condominium Corporation is acting strictly within its bylaws, as I discussed in *Reilly v. Freedom Gardens*, [2001] A.J. No. 1703, 2001 ABQB 1002 and [2001] A.J. No. 1704, 2001 ABQB 1018.

¶ 62 In the case at bar I conclude that the violations have been proven by the Condominium Corporation, and that the Appellant has shown flagrant disregard for the rules of the Corporation.

Eviction as Owner

¶ 63 The Corporation is a corporation within the meaning of the C.P.A.. The Bylaws are bylaws within the meaning of the C.P.A.. The Appellant is an owner within the meaning of the C.P.A..

* Sections 1 and 25, C.P.A.

¶ 64 Section 67 C.P.A. states: -

(1)(a) "improper conduct" means

(i) non-compliance with this Act, the Regulations, or the Bylaws by...an owner,

(b) "interested party" means a corporation... or any other person who has registered interest in a unit;

(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) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;

(b) if the applicant suffered loss due to the improper conduct, award compensation to the applicant in respect of that loss;

(c) award costs;

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

¶ 65 The decision to evict was properly within the Court's discretion, as it is expressly granted to the Court in s. 67 of the C.P.A..

¶ 66 The Appellant states that Section 13 of the Interpretation Act, limits the discretionary power of the Court. However, this section merely outlines that provisions cannot be interpreted in a manner that is contrary to another provision in that Act, or in the Regulations. This was not the case in the present appeal.

¶ 67 The C.P.A. does not state that the remedy of eviction of an owner is unavailable. If an act is silent as to a specific remedy, it does not mean that remedy cannot be granted.

¶ 68 Section 67 of the C.P.A. grants wide discretion to the Court where there has been improper conduct by an "owner".

¶ 69 The Master was advised of the Appellant's status as owner, and exercised his discretion and ordered the Appellant to vacate the premises by July 15, 2003.

Constructive Trust

¶ 70 The Notice of Termination of Tenancy, issued pursuant to s. 54 C.P.A., dated April 17, 2003 validly terminated the tenancy between the Appellant and her parents.

¶ 71 The Appellant did not vacate the premises by May 31, 2003, the date the tenancy was terminated. The Appellant's father was aware that the eviction was being enforced. The Appellant was then transferred Title to the premises by her parents, for little or no consideration.

¶ 72 I conclude that the only reasonable inference is that the premises were transferred for the sole purpose of defeating the eviction enforcement.

¶ 73 The Appellant argues that this situation represents a resulting trust. However as discussed in *Niles v. Lake* [1947] S.C.R. 291 a mere gratuitous transfer of property, real or personal, although it may convey the legal Title, will not benefit the transferee unless there is some other indication to show such an intent, and the property will be deemed in equity to be held on a resulting trust for the transferor. The onus is on the transferee to disprove this resulting trust, and something more than a mere transfer is required to rebut this presumption.

¶ 74 The Appellant has put no evidence before the Court to rebut this presumption.

¶ 75 She has not shown that a gift was intended. I conclude that her parent are beneficially entitled to the premises, and that the Appellant is holding the premises in trust for her parents.

¶ 76 In this event, the Appellant should be evicted from the premises under s. 55 of the C.P.A., as she is in fact a tenant, and a trustee for her parents.

Injunction

¶ 77 Even if I am wrong in the above conclusions, an injunction should be granted pursuant to s. 85 of the Bylaws requiring that the Appellant not commit any further breaches of the Bylaws.

Damages

¶ 78 I also conclude that the Corporation is entitled to compensation for damage to the common property caused by pets in the Appellant's care and control, pursuant to s. 79 of the Bylaws.

¶ 79 The Condominium Corporation is entitled to its costs as the sole reason it is in court proceedings is because the Appellant failed to comply with the Bylaws, and then failed to leave the premises when she was evicted.

¶ 80 The Corporation is entitled to costs on a solicitor and her own client indemnity basis pursuant to s. 86 of the Bylaws.

DISPOSITION

¶ 81 Assuming that the Appellant is actually an "owner" of the Condominium, which she probably is not, I conclude that the Master properly interpreted the C.P.A. regarding the available remedies against a condominium "owner", and did not exceed the jurisdiction granted to him under the C.P.A. when he ordered her to be evicted.

QUICKLAW

¶ 82 The Master applied the discretionary power granted to him by the C.P.A., and imposed an appropriate remedy, namely the delivery of vacant possession of the condominium by the Appellant, whether or not she was the owner of her condominium.

¶ 83 The appeal is dismissed, and the Respondent is entitled to solicitor-client costs in this matter.

LEE J.

QL UPDATE: 20031009
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QUICKCITE

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