In the Provincial Court of Alberta

Citation: Condominium Plan No. 772 1985 v. McNeil, 2012 ABPC 243

Date: 20120907
Docket: P1290300557
Registry: Edmonton

Between:

The Owners: Condominium Plan No. 772 1985

Plaintiff

- and -

Kevin John McNeil

Defendant

Reasons for Judgment of the Honourable Judge G.W. Sharek

I. INTRODUCTION

[1] This matter came before me by way of Chambers Applications on August 14, 2012. The Plaintiff in this matter, The Owners: Condominium Plan No. 772 1985 brings this action against the Defendant, Kevin John McNeil who at all relevant times was the owner of a condominium unit in their building and it was agreed that he was an owner as defined under the *Condominium Property Act*, R.S.A. 2000, c. C-22 (the "*Condominium Property Act*" or the "Act").

[2] The parties were involved in previous litigation wherein the Defendant, Kevin John McNeil ("McNeil"), was Plaintiff, and the Plaintiff, The Owners: Condominium Plan No. 772 1985 (the "Condominium Corporation"), was the Defendant. For simplicity sake, I will refer to the Plaintiff in this action, The Owners: Condominium Plan No. 772 1985 as (the "Condominium Corporation"), and the Defendant in this action, Kevin John McNeil as "McNeil". The essential facts are not in dispute.

II. FACTS

[3] McNeil initiated legal proceedings against the Condominium Corporation on June 18, 2009 in this court, seeking recovery of the costs of plumbing repairs to a leaking pipe plus damages suffered as a result of the leaking pipe in the amount of $2,660.77. That action, being Action No. P0990302932 proceeded to trial and was heard by the Honourable Judge M. Donnelly (the "trial judge") who rendered judgment orally on February 9, 2010. McNeil's action against

the Condominium Corporation was dismissed in its entirety, and after hearing submissions regarding costs from both McNeil and counsel for the Condominium Corporation, the trial judge awarded costs in the amount of $350.00 to the Condominium Corporation as successful Defendant, which I consider to be tantamount to party-party costs. No appeal of that decision was pursued.

[4] On February 7, 2012, the Condominium Corporation initiated this action against McNeil claiming $7,129.55 plus costs representing the actual legal costs that the Condominium Corporation incurred in defending McNeil's initial action. There were two applications brought before me August 14, 2012, one being brought by McNeil for summary judgment against the Condominium Corporation, and the other being a summary judgment application by the Condominium Corporation against McNeil. It was agreed by both counsel during the application on August 14 that all relevant facts were brought to the court's attention during the course of these applications, and they agreed that it was most likely not necessary for the matter to proceed to trial as scheduled for September 6, 2012 and that trial was therefore adjourned *sine die*, by consent.

[5] McNeil's Affidavit in this matter contains, as an exhibit, a copy of the transcript of that portion of the February 9, 2010 trial held before the trial judge, dealing with costs. After dismissing McNeil's claim, the trial judge invited submissions from both parties with respect to costs. Amongst other submissions, counsel for the Condominium Corporation referred to the Condominium Corporation Bylaws, and he quoted the following from the Bylaws:

> "An owner shall pay to the corporation all legal expenses incurred as a result of seeking compliance with or enforcement of the Bylaws".

[6] The transcript also reveals that in his submission regarding costs, counsel for the Condominium Corporation, in referring to the Corporation's Bylaws, stated:

> "And it's my respectful submission that that would entitle -- now, I appreciate it envisions taking some proceedings but it talks about proceedings for the purpose of seeking compliance with or enforcing of the Bylaws. And I appreciate it normally -- from the perspective of the corporation taking a proceeding, and that's typically -- and I didn't make reference to the [Condominium] *Property Act* which has a specific provision for solicitor and client costs, but it's clear on that one it's where you -- you've taken –
>
> THE COURT: take action.
>
> MR. SUSSMAN: -- you're taking action and so I didn't address that. But it's my respectful submission that the bylaw is broad enough to encompass the corporation being entitled to costs on a solicitor client basis, even where it's a Defendant but it's defending the -- its Bylaws and implementation."

The Condominium Corporation's Bylaw cited in this action is Section 89, which is quoted in the Civil Claim, as follows:

> "The Corporation may recover from an Owner by an action for debt in any Court of competent jurisdiction any sum of money, including its costs on a solicitor and his own client indemnity basis, which the Corporation is required to expend as a result of any act or omission by an Owner, his servants, agents, licensees, invitees, Tenants or Occupiers which violates these By-laws or any resolutions established pursuant to these By-laws and there shall be added to any judgment all costs of such action including indemnification of the Corporation's legal costs as between solicitor and his own client. Nothing herein shall be deemed to limit any right of any Owner to bring an action or proceeding for the enforcement and protection of his rights and the exercise of his remedies."

III. ISSUE

[7] The issue in these applications and in this litigation is whether the Condominium Corporation is entitled to recover it's full legal expense incurred on a solicitor and his own client basis in defending the previous action initiated against it by McNeil, in addition to the $350.00 costs awarded by the trial judge.

IV. THE PARTIES' POSITIONS

The Condominium Corporation's Position

[8] The Condominium Corporation relies upon Section 39 of the *Condominium Property Act*, the relevant portions of which read:

> "**39(1)** In addition to its other powers under this Act, the powers of a corporation include the following:...
>
> (d) to recover from an owner by an action in debt any sum of money spent by the corporation
>
> (I) pursuant to a bylaw..."

The Condominium Corporation also relies upon Section 42 of the *Act*, which states, in part:

> "**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..."

[9] The Condominium Corporation argues that in addition to the costs recoverable, and recovered, in the first litigation, it now has a second cause of action based on Section 89 of the bylaws read together with those sections of the *Condominium Property Act* referred to above. Indeed, counsel for the Condominium Corporation at the most recent application submitted that it could not have sought recovery of solicitor and his own client costs at the previous trial, as it had not brought an action against McNeil for those costs, but rather was defending McNeil's action, and furthermore stated that the Condominium Corporation was not contesting the findings of the trial judge.

[10] The Condominium Corporation relies on the decision of the Supreme Court of British Columbia in *Hill v. Strata Plan NW 2477*, [1995] B.C.J. No. 1906. In that case the Hills were owners of a condominium unit, and took the position that they were entitled to two parking stalls without being assessed monthly fees, and furthermore that they were entitled to sublet their unit in contravention of the council's rental limitation bylaw. The Hills initially won their lawsuit on both issues, but the Strata Corporation successfully appealed the decision regarding parking spaces, but no appeal was taken by the condominium council regarding the rental limitation bylaw finding. The Court of Appeal awarded the Strata Corporation taxable costs, which the Hills paid. The Strata Corporation then brought a second action, which was successful, seeking payment of legal costs of $12,578.42 which the Provincial Court awarded to the Strata Corporation. On appeal, the Supreme Court of British Columbia upheld the Provincial Court decision, based upon Section 127 of the *Condominium Act*, R.S.B.C. 1979, c. 61, which stated as follows:

> "127.(1) An infraction or violation of these bylaws or any rules and regulations established under them on the part of an owner, his employees, agents, invitees or tenants may be corrected, remedied or cured by the strata corporation. Any costs or expense so incurred by the corporation shall be charged to that owner and shall be added to and become part of the assessment of that owner for the month next following the date on which the costs or expense are incurred, but not necessarily paid by the corporation, and shall become due and payable on the date of payment of the monthly assessment.
>
> (2) The strata corporation may recover from an owner by an action for debt in a court of competent jurisdiction money which the strata corporation is required to expend as a result of an act or omission by the owner, his employees, agents, invitees or tenants, or an infraction or violation of these bylaws or any rules or regulations established under them (my emphasis)."

To be clear, the emphasis shown in the quote is that of the Supreme Court of British Columbia. That Court furthermore went on to rely on the case of *Strata Plan VR243 v. Hornby*, [1986] B.C.J. No. 2353, and particularly the following from that case:

> "Because the respondents refused to comply with the bylaw there can be no question the Strata Corporation was faced with the problem of enforcing its bylaw in a lawful manner. To do that it became necessary to resort to the courts. It was therefore necessary to

> instruct counsel to initiate and carry out such steps as were necessary to enforce its bylaw. The Strata Corporation now seeks to recover the money it was required to expend as a direct result of the owner's refusal to comply with the bylaw.
>
> Under s.127(2) the Strata Corporation is entitled to such recovery."

In summary, the Condominium Corporation maintains that it has an independent cause of action for solicitor and his own client costs based upon the aforesaid sections of the *Act*, and its Bylaws.

McNeil's Position

[11] McNeil argues that notwithstanding the *Condominium Property Act* provisions, the doctrine of res judicata applies, particularly the principle of issue estoppel. Furthermore, citing the textbook *The Doctrine of Res Judicata in Canada*, 3rd ed. (LexisNexis, 2010) by Donald J. Lange, McNeil relies on the following, taken from page 346:

> "Decisions in regards to costs in a proceeding are the following. All arguments in regard to costs must be brought forward at the same time to avoid cause of action estoppel. Where the amount of costs, or who may be liable for the costs, in a proceeding is determined, those issues are estopped."

I note that further on that same page, it is stated:

> "A determination of the scale of costs gives rise to issue estoppel in a subsequent proceeding."

Furthermore, McNeil relies on the decision of the Alberta Court of Appeal in *Condominium Plan No. 7510189 v. Jones*, [1997] A.J. No. 1366. The Jones owned a condominium unit and refused to pay their proportionate share of a special levy for roof repairs. The Condominium Corporation registered a caveat and obtained a declaration that the caveat was valid, and a proper charge for the assessment, interest and solicitor client tax costs of $20,790.77. That order containing the declaration was not appealed, nor was the taxation of costs. Subsequently, the Jones fell into arrears in payment of their condo fees because the amounts paid by them were first applied to arrears and additional liabilities owing. The Condominium Corporation then registered a second caveat, brought foreclosure proceedings, obtained summary judgment and then obtained an order nisi which declared a sum due owing under each caveat, and awarded costs against the owners. However, reference to the outstanding amount of solicitor client costs from the first order was omitted in the order nisi, but no appeal was taken from the order nisi nor any action taken to correct the omission of the earlier costs. The Alberta Court of Appeal found that the order nisi extinguished the obligation to pay the legal costs awarded pursuant to the first order, and that issue estoppel applied, as the matter was res judicata.

In summary, McNeil's position is that the Condominium Corporation has already had an opportunity to make submissions with respect to costs of that earlier litigation, they did make

such submissions which included references to the bylaws and the *Condominium Property Act*, and they ought not to have a second opportunity to present the same arguments or further arguments.

V. ANALYSIS

[12] Orkin, in *The Law of Costs*, 2nd ed. looseleaf (Canada Law Book, 1987), paragraph 305.1(6) addresses issue estoppel as it relates to costs:

> "The doctrine of issue estoppel prevents a party from re-litigating an issue already decided in an earlier proceeding. The requirements are (1) that the same question has been previously decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

[13] Those criteria are taken from *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853, which was cited by the Supreme Court of Canada in *Angle v. Canada (Minister of National Revenue - M.N.R.)*, [1974] S.C.J. No. 95.

[14] The Alberta Court of Appeal, in *Ernst Young Inc. V. Central Guaranty Trust Co.*, [2007] 2 W.W.R. 474, stated at paragraph 30:

> "For issue estoppel to be successfully invoked, the issue must be the same as the one decided in the prior judicial decision, the prior judicial decision must have been final, and the parties to both proceedings must be the same, or their privies: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.) at para. 23 [*Toronto*]."

[15] I find that the doctrine of issue estoppel is applicable in the case at bar, as the three requirements as cited by Orkin and the Alberta Court of Appeal are met, for the following reasons.

[16] Firstly, this subsequent litigation is an effort by the Condominium Corporation to recover those same costs which they sought to recover before the trial judge in February 2010. As is clear from the transcript, the Condominium Corporation had an opportunity to make submissions supporting a claim for solicitor and his own client costs. They had the opportunity to refer to the Condominium Corporation's Bylaws, which they did, and they also had an opportunity to refer to the *Condominium Property Act*, which they also did. The fact that they have now brought a subsequent action for recovery of those same costs does not change the true character of the relief now sought. They unsuccessfully argued for recovery of solicitor and his own client costs, and now seek to obtain that same relief.

[17] Secondly, the decision of the trial judge was clear and final in refusing to grant solicitor and his own client costs, but rather costs of $350.00 in accordance with what the trial judge

referred to as "the guidelines" ordinarily followed by the Provincial Court, Civil Division, which I would categorize as being tantamount to party-party costs.

[18] It is notable that no appeal of the trial judge's decision regarding costs was taken by the Condominium Corporation. They could have pursued that course of action, but chose not to. Counsel for the Condominium Corporation in the within applications stated clearly that the Condominium Corporation was not questioning or disputing the findings of the trial judge.

[19] The Condominium Corporation argues that bringing this subsequent litigation entitles it to recover those solicitor and his own client costs expended as it now falls within the wording of Section 39(1)(d) and Section 42 of the *Condominium Property Act* in that it has now taken "an action in debt" to recover the monies spent by the Corporation pursuant to "its bylaw." I do not agree.

In the *Jones* case, the Alberta Court of Appeal in addressing whether the debt for costs and interest would continue to exist as a separate debt stated at paragraph 20, that to permit this would overlook "the fact that the Order Nisi was obtained in the action taken by the Respondent to enforce, inter alia, its claim for the costs granted in the First Order." The Court stated that "the issue of the Appellants' liability for these costs was therefore before the Court and dealt with by the finding made in the Order Nisi. It does not therefore continue to exist as a separate debt or judgment."

The Alberta Court of Appeal also went on to say that such an approach would run counter to the principle of cause of action estoppel. Citing the case of *420083 B.C. Ltd. v. Bank of Montreal*, (1995), 34 Alta L.R. (3d) 269 at 281, the Court adopted the following:

> "...the estoppel which arises between parties by reason of a judgment given in favour of one and against the other with respect to the cause of action set up in the first proceedings ... Its operation prevents a party to an action from asserting or denying as against the other party the existence of a cause of action the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties...
>
> This branch of estoppel by **res judicata** applies not only to subsequent claims or defences based on matters specifically decided in the prior action but <u>also to every claim or defence which could properly have been raised in those proceedings</u>." [underling added]

[20] Based on this analysis, sections 39 and 42 of the *Condominium Property Act* do not vest the Corporation with a second cause of action on this set of facts.

[21] My reading of those sections of the *Condominium Property Act* suggests that it is intended to cover those situations where the Condominium Corporation is required to pursue litigation in order to enforce its bylaws. It is not intended to cover the situation where the

Condominium Corporation, albeit in reliance on its bylaws, successfully defends an action initiated by an owner.

[22] The costs awarded in such successful litigation are solely within the discretion of the trial judge which Orkin, at paragraph 202, states may be termed in the Court's absolute and unfettered discretion, subject to statutory provisions or Rules of Court.

[23] In that regard, I note that Section 9.8(1) of the *Provincial Court Act*, R.S.A. 2000, c. P-31 (the "*Provincial Court Act*") states:

> "The Court may at any time in any proceeding before the Court and on any conditions that the Court considers proper award costs in respect of any matters coming under Part 4."

[24] Part 4 deals with Civil Claims, such as the two claims relevant here. That statutory provision, in my view, underscores the Court's complete discretion in awarding costs "on any conditions that the Court considers proper." Of course, the award of costs may also have been the subject of an appeal, which was not taken here.

The Condominium Corporation has plead in its Civil Claim; Bylaw 88(b) as set out above this enables the Condominium Corporation to add to the owner's assessment any costs or expenses incurred by the Corporation in correcting, remedying, or curing an infraction of the bylaws. There was no such infraction here, but rather reliance by the Corporation on the bylaws in defending a claim pursued by an owner. It is noteworthy that Bylaw 89 as plead by the Plaintiff also states "nothing herein shall be deemed to limit any right of any owner to bring an action or proceeding for the enforcement and protection of his rights and the exercise his remedies." The Bylaws therefore contemplate such an action by an owner. Section 89 of the bylaws also entitles the Corporation to recover costs out of solicitor and his own client indemnity basis "which the Corporation is required to expend as a result of any act or omission by an owner,...which violates these bylaws...". There is no allegation in this Civil Claim of the violation of bylaws by McNeil, nor is there any evidence in this second action suggesting that the Corporation was taking action to cure a violation of its bylaws.

[25] Thirdly, the parties to the trial judge's decision are the same parties in both matters. The Plaintiff in the present litigation was a Defendant in the first litigation, and likewise the Plaintiff in the first litigation is now the Defendant. The parties are the same, their roles have merely been reversed.

[26] I find that the Hill and Hill case is distinguishable from the case at bar. In the Hill and Hill case, the Condominium Corporation was seeking to enforce its bylaws, and as can be seen from the quote relied upon from the *Hornby* case, there was a refusal by the owner to comply with the bylaw, placing the Strata Corporation in the position of having to enforce its bylaw in a lawful manner and resort to the courts. For that purpose, it was necessary to instruct counsel to initiate and carry out such steps as were necessary to enforce its bylaw.

[27] The Alberta legislation, Section 39(1)(d) is similar to subsection 127(2) of the *Condominium Act*, R.S.B.C. 1979, c. 61 in that they both contemplate the Condominium Corporation having to take proactive steps to enforce its bylaws. To find that the Condominium Corporation would be entitled to recover all solicitor client costs in any litigation involving interpretation of its bylaws is not the intention of Section 39(1)(d) of the *Act*.

[28] When a condominium corporation successfully relies upon its bylaws to defend an action, costs of that action are within the discretion of the Court and in this case, the trial judge.

[29] Accordingly, as I have found that Section 39 of the *Act* is inapplicable, I find that the doctrine of issue estoppel prevails, and has not been statutorily overridden. The trial judge invited and received submissions with respect to costs including solicitor and his own client costs sought by the Condominium Corporation, and declined to award such costs. The Condominium Corporation did not pursue an appeal of that decision, and is now prevented from re-litigating the issue already decided by the trial judge.

As the parties essentially agreed that this matter can be decided at this stage, I will not review the requirements regarding Summary Judgment.

VI. CONCLUSION

[30] In conclusion, the summary judgment application of the Plaintiff is dismissed, and the summary judgment application of the Defendant succeeds. The Plaintiff's claim is summarily dismissed.

[31] The Defendant shall have its costs which can be spoken to, but in any event those costs would include those incurred by the Defendant in obtaining the transcripts of the February 2010 proceedings.

Heard on the 14th day of August, 2012.

Dated at the City of Edmonton, Alberta this 7th day of September, 2012.

G.W. Sharek
A Judge of the Provincial Court of Alberta

Appearances:

Brian S. Sussman, Q.C., of Biamonte, Cairo & Shortreed LLP
for the Plaintiff

David B. Wolsey, of Snyder & Associates LLP
for the Defendant