

Court of Queen's Bench of Alberta

Citation: Condominium Plan No. 9910225 v Davis, 2012 ABQB 49

Date: 20130123

Docket: 1208 00285

Registry: Medicine Hat

Between:

Condominium Plan No. 9910225

Applicant

- and -

Allen Davis and Adelaide Davis

Respondents

**Memorandum of Decision
of the
Honourable Mr. Justice R. G. Stevens**

[1] This is an application by Condominium Plan No. 9910225 (9910225) for a declaration that the Respondents Allen and Adelaide Davis are in violation of its By-laws, and for an injunction restricting the use of live-in caregivers or the occupancy of the Respondents' condominium unit by anyone other than those individuals permitted by the By-laws. In addition, 9910225 seeks a monetary sanction against the Respondents in the amount of \$10,000 and solicitor-client costs.

[2] Allen Davis is 87 years old, and is blind. Adelaide Davis suffers from dementia and now has a guardian and trustee. Allen and Adelaide Davis lived in their condominium unit together from January 2000 to October, 2011, when Adelaide was moved into a nursing home. Allen Davis continues to live there.

[3] In October 2009, Allen Davis hired Pacienta Subrado to provide assistance to himself and Adelaide on a 24-month term. The Employment Contract that Mr. Allen signed and registered with the Government of Canada's Foreign Worker Program indicates that Ms. Subrado would provide cleaning, meal preparation and laundry assistance would assist with dressing and bathing Adelaide Allen, and would in addition provide medical services such as the administering of prescription medication and checking blood pressure. Ms. Subrado would provide 24-hour care and would therefore live in the residence. The Employment Agreement provided that the employer would recoup costs in respect of Ms. Subrado's accommodation at an amount of \$336 per month through payroll deductions.

[4] Article 62(a)(iv) of the By-laws provides:

An owner SHALL NOT:

iv. use or permit the use of his Residential Unit other than as a single family dwelling or for a purpose other than for residential purposes.

[5] "Single Family Dwelling" is defined in the By-laws as "a Unit occupied or intended to be occupied as a residence by one family alone and containing no more than one kitchen and in which no roomers or boarders are allowed". The terms "roomer" and "boarder" are defined identically in the By-laws, to mean "a person to whom room and board is regularly supplied for consideration".

[6] In December 2009, 9910225 received notice that the Allens had a live-in caregiver residing with them, and advised the Allens that should a complaint be received, the Board would have no option but to enforce the By-laws. At the Condominium Owners Annual General Meeting in May 2010 a motion to change the By-laws to allow live-in caregivers was rejected by some 90% of the voting unit holders. On September 29, 2011, 9910225 served notice upon the Allens that they were required to conform to the By-laws, and that commencing October 1 2011 they would be subject to a monetary sanction in the amount of \$50 per day for so long as Ms. Subrado continued to live at the Allens' residence. On November 25, 2011 the Condominium Board passed a resolution directing that notice be provided to any owner in violation of the By-laws prohibiting roomers or boarders with notice to allow them to resolve the contravention or vacate their unit by March 31, 2012. This notice was provided to Mr. Allen by registered mail on December 9, 2011 and again on February 7, 2012. On April 12 2012, by way of a formal notice that was handed to Mr. Allen, Ms. Subrado was directed by the Board of Condominium Corporation No. 9910225 to vacate the premises. On June 6, 2012 correspondence was sent to Mr. Allen requesting that he confirm that Ms. Subrado had vacated the premises, but no confirmation was received. Ms. Subrado has not resided in the Allen condominium since August 1, 2012.

Issue:

[7] Does Article 62(a)(iv) of the By-laws prohibit a live-in caregiver from residing in a unit, such that 9910225 is entitled to an injunction and monetary sanctions against the Respondents?

Analysis:

[8] The function of condominium By-laws was described by Hawco J. in *Condominium Plan No. 9310520 v. Smith*, at para. 5:

...the corporation's by-laws are a contract among the owners specifying a manner in which they wish to coexist. They are entitled to make such a contract, particularly when made in good faith for a reasonable purpose, which was to protect what they undoubtedly believe is their enjoyment of their property and their quality of life.

[9] Because condominium By-laws are in the nature of a contract between the owners of the units of the condominium, and because the *Canadian Charter of Rights and Freedoms* does not extend to "activities by non-governmental entities created by government for legally facilitating private individuals do things of their own choosing without engaging governmental responsibility", the by-laws of the condominium corporation are not bound by the *Charter: Condominium Plan No. 9310520*, at para.5. Nor, as Hawco J. concluded at para.6, are they governed by s.4 the *Alberta Human Rights Act*, R.S.A. 2000, c.A-25.5, because that section prohibits discrimination against any person or class of person with respect of accommodation or facilities that are *customarily available to the public*, and of course condominium units are not. It is not at all uncommon, for example, for condominium By-laws to discriminate on the basis of age, and it is well established that a condominium corporation is legally entitled to do so.

[10] The issue here, therefore, is not with the validity of the By-laws under the Charter or Alberta's Human Rights legislation. The issue is one of interpretation. Do the By-laws' prohibitions against the use of a unit for anything other than a "single family dwelling" and against roomers and boarders extend to a live-in caregiver? I should note that the legitimacy of the Allens' need for Ms. Subrado's services has not been challenged by the Condominium. Mr. Allen, as I have noted, is blind. Ms. Allen suffers from dementia.

[11] Article 65 of the By-laws is entitled "Declaration of Purpose", and provides:

The restrictions in use in these By-Laws have the following purposes:

- a. To provide for the health and safety of condominium occupants;
- b. To maintain the Residential Units, Parking Units and Common Property Units in such a manner as to preserve property values;
- c. To provide for the peace, comfort and convenience of the Owners and occupants;
- d. To develop a sense of community.

[12] The parties did not provide me with any authorities that would illuminate whether, as a general proposition, live-in caregivers, maids or nannies fall within the category of roomers or boarders. I am not aware of any decisions in this province or indeed in Canada wherein the issue has been decided. In the absence of binding or persuasive authority, I am left with the general principles of interpretation. It is now so well established as to be axiomatic, in Canadian law, that Courts are to apply the “modern principle of interpretation” to both statutes and contracts. The principle is described in Sullivan: *Sullivan and Driedger on the Construction of Statutes*, 4th. Ed. (Butterworths: Vancouver), at p.1:

Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[13] Article 65 of the By-laws is what is known as a “Purpose Statement”, and though the assistance purpose statements provide in interpretation is limited (Sullivan, at p.210), the modern approach to interpretation, with its focus on the entire scheme of the legislation or contract, requires that the purpose statement be considered as a part of the context for the more specific provisions contained in Article 62(a)(iv) and the definitions of roomers and boarders. It is appropriate therefore, in considering whether live-in caregivers are forbidden under these By-laws, to consider that their purpose includes providing for the health, safety, peace comfort and convenience of condominium occupants, as well as the maintenance of property values and development of a sense of community.

[14] It is after considering the Condominium By-laws as a whole that I conclude that the presence in a unit of a live-in caregiver, who is required to provide necessary assistance to infirm residents, does not mean the unit is “being used other than as a single family dwelling or for a purpose other than for residential purposes”. In view of the purposes of the By-laws, and in particular the expressed purposes of the health, safety, comfort and convenience of condominium applicants, it would be unreasonable to include in the definition of roomers and boarders live-in caregivers required to provide necessary medical care. To prohibit a live-in caregiver in circumstances where one is necessary may provide a marginal enhancement to other unit holder in terms of convenience or property values, though the point is debatable. On the other hand, such a prohibition could be devastating to the unit holder in need of medical care. I simply cannot reconcile a prohibition against live-in caregivers with the stated purposes of the By-laws.

[15] I should reiterate that the foregoing analysis is based upon an interpretation of the By-laws themselves, and not upon the rights of the Allens under the *Charter of the Alberta Human Rights Act*. Counsel for the Allens has argued that “It is hard to fathom that a Court might enforce condominium By-laws that restrict occupancy based on factors such as race, gender or physical handicap.” Given the wide acceptance of age restrictions in condominium By-laws, the question may be an open one. It need not be decided here, but counsel’s argument illuminates another reason why the By-laws must not be interpreted so broadly as the 9910225 contends, and

that is this: if condominium corporations are to be allowed to discriminate for “reasonable purposes” or, using counsel’s hypothetical, unreasonable ones, they should at a minimum be expected to do so clearly. A condominium corporation discriminating, in its By-laws, on the grounds described by counsel would be expected to suffer the approbation of Albertans and, one might further expect, in the market. Similarly, if a condominium corporation intends through its By-laws to prevent unit holders from having access to necessary live-in medical assistance, the condominium corporation should make this intention clear. It is not enough to reject a resolution to expressly allow live-in caregivers in the By-laws, because that only reflects the 9910225's erroneous interpretation that live-in caregivers have been excluded. It was open at all times to 9910225 to expressly exclude live-in caregivers the way it has roomers and boarders. It is still open to 9910225 to do so. That way, prospective purchasers might be made aware that, in the event that they suffer some catastrophe or infirmity, 9910225 will require them to vacate, rather than have access to necessary live-in medical care.

Conclusion:

[16] The Application for a declaration, permanent injunction, monetary sanction and costs is denied.

Heard on the 15th day of November, 2012.

Dated at the City of Calgary, Alberta this 17th day of January, 2013.

R. G. Stevens
J.C.Q.B.A.

Appearances:

Kevin C. E. Kurtz
for the Applicant

Kenneth C. Reeder
for the Respondents