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Morris v. Condominium Corp. No. 074 0215

Camonia Morris, Applicant and Condominium Corporation No. 074 0215, Respondent

Alberta Master

Master L.A. Smart

Judgment: April 23, 2012
Docket: Edmonton 0903-13616

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Counsel: Hugh Willis, for Applicant

Michael Coombs, for Respondent

Subject: Corporate and Commercial; Property

Business associations.

Real property.

Master L.A. Smart:

Background

1 The Applicant Camonia Morris (Morris) seeks an order pursuant to section 67(2)(a) of the Condominium Property Act to appoint an investigator. It is useful to set out the whole of section 67:

67(1) In This section,

(a) "improper conduct" means

(i) non-compliance with this Act, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner,

(ii) the conduct of the business affairs of a corporation in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,

(iii) the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that

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unfairly disregards the interests of an interested party,

(iv) the conduct of the business affairs of a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit, or

(v) the exercise of the powers of the board by a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit;

(b) "interested party" means an owner, a corporation, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit.

(2) Where on an application by an interest party the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following:

(a) direct that an investigator be appointed to review the improper conduct and report to the Court;

(b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;

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

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

(e) award costs;

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

(3) The Court may grant interim relief under subsection (2) pending the final determination of the matter by the Court.

2 The condominium is a three level-15 unit wood frame building constructed approximately 40 years ago. It was purchased by 1359522 Alberta Ltd (the "Developer") as an apartment rental complex and converted to a condominium in 2007. Thirteen units are still owned by the Developer and rented out to tenants. Morris purchased Unit seven and became registered owner on December 28, 2007.

3 Since 2008 there have been problems with bedbugs, smoking in the building, advertising and licensing of the property as a rental property with smoking permitted, water damage to Morris's unit originating from another unit, mould contamination, failure to have annual meetings, failure to prepare financial statements, delay in making repairs, concerns over allocation of expenses attributable as between rental activities and the common property, and concerns over the conduct of the property manager. Many of these issues have been addressed but doubts and concerns still linger.

4 In October 2009, under a Consent Order the Condo Corp. engaged a third party to perform an inspection of Morris's unit regarding ceiling damage and condition of the windows. Repairs to the ceiling damage and mould were later repaired. Review engagement financial statements for 2008, 2009 and 2010 were completed following a court

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Order on December 16, 2010. It is alleged there remain discrepancies with other financial data provided by the Developer.

5 Under section 38 of the Act, Condo Corp.'s must establish and maintain a capital reserve fund. In order to comply a "Reserve Fund Study" is completed. A copy of what is described as a Reserve Fund Study is attached to the Affidavit of Azim Velji, a director of the Developer and a director on the of the Condo Corp. board. This particular Study was done in January, 2007 about one year before the conversion and although it is said to be the Study, it is clearly only a portion of it. It identifies the need for significant repairs or replacement of exterior cladding, the boiler, water heater and probably windows which one would expect for a 40 year old building. Strangely it addresses repairs and upgrades inside units which do not form part of the common property and would not be the responsibility of a Condo Corp. Not having the whole of the Study it is difficult to fully assess but what I have appears superficial. Although no standards are set by the Act, its adequacy is questionable, quite apart from it now being seriously out-dated.

Discussion

6 The Affidavits filed and Questioning on those Affidavits demonstrate a poor understanding of the fundamental nature of condominiums and condominium ownership by both the Owners and Developer. To some extent this also appears true for the property manager and particularly disappointing is the lack of leadership one might expect from those who are hired to provide guidance. The history and current state of ownership of this condominium complex combined with this lack of understanding has lead to a Condo Corp. that is dysfunctional and unable to comply with the duties and responsibilities under the Act.

7 Morris asked for an investigator to be appointed to help resolve the current state of affairs. The investigator recommended has an hourly rate of \$225. Morris asks that the cost of the investigator be borne by the Developer. If the Condo Corp. covers the cost in effect the Developer as an owner pays the lion's share regardless. Counsel for the Condo Corp. and Developer says that this matter can be resolved through the normal litigation process. He argues that the cost of appointing an investigator would be a significant and unnecessary additional financial burden on the Condo Corp. Although I don't know the hourly rates of the counsel arguing this matter, I feel safe in saying that their combined hourly rates would cause that of the investigator's to pale by comparison.

Conclusion

8 I am advised that there are no reported decisions where the courts have appointed an investigator pursuant to section 67 (2)(a) of the Act. It is suggested that it is demonstrative of the reluctance of courts to invoke the remedy. Perhaps that is so but it is certainly not a reason to shy from appointing an investigator where appropriate. In my view, there appears to be ample evidence of "improper conduct" as defined by section 67 (1) (a) arising from the noncompliance of the Act, and bylaws by the Condo Corp. In making this determination, I have not determined nor must I determine that the misconduct is otherwise malafides but only that the actions caused the result constituting improper conduct as defined by the Act.

9 Under the circumstances, I conclude that this is not only appropriate but a classic case for the appointment of an investigator. Despite arguments of counsel for the Condo Corp., I am of the view that litigation of the concerns expressed by Morris is both a costly and inefficient manner in which to achieve the ultimate goal of a properly functioning Condo Corp. Understandably the investigator was not asked nor was Morris's counsel able to provide any guidance as to how much time the investigator might require. Nonetheless, I am conscious that there will be a financial consequence and that it may be desirable to limit the amount of time spent by the investigator at least in the first instance. With that in mind, I approve the appointment of Deborah Howes as an investigator, initially limited to 20 hours. The report of the investigator will be filed with the court and made available to all parties. The cost of the investigator will be borne by the Condo Corp. as all owners will be the beneficiary of the report. Costs of this appli-

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cation will be in the cause.

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