Court of Queen's Bench of Alberta

Citation: Sager v Condominium Plan No 9523979, 2015 ABQB 549

Date: 20150902
Docket: 1103 19562
Registry: Edmonton

Between:

David Sager and Stacey Kinred

Applicants

- and -

The Owners: Condominium Plan No. 9523979

Respondent

Reasons for Judgment
of
L.A. Smart, Master in Chambers

Introduction

[1] David Sager and Stacy Kinred (the "Applicants") purchased Unit 7 in Condominium Plan 9523979 located in Edmonton on or about January 31, 2008. It consists of a townhouse style unit with an adjacent driveway on the common property that is assigned to them for exclusive use. Sager was a school bus driver from November, 2008. He operated a 2000 Ford F350 minibus owned by his employer and parked it on the driveway assigned for exclusive use as a parking space.

[2] The Respondent's Bylaw 69(a) prohibits parking of motor vehicles over 3000 kg in any parking space without the written consent of the board, which consent may be arbitrarily withheld and may, if given, be withdrawn at any time on 15 days' notice. For the first time, by letter dated January 29, 2010, the Property Manager of the Respondent noted the school bus was observed in the Applicants' parking space and demanded its immediate removal. The letter cited Bylaw 69(a) implying that it took the position that the minibus weighed over 3000 kg. Sager responded by letter dated February 8, 2010 noting that other units were parking vehicles of similar size and weight in their assigned spaces. He offered to park the minibus on the road in the spring but said it was necessary to plug it in during the winter months and requested permission to continue parking the minibus in his assigned parking space. No reply was received and a second copy of that letter was mailed along with a handwritten note requesting a response to his request. The Property Manager responded on March 26, 2010 simply iterating the demand without response to the request. That letter was returned to the Property Manager with a handwritten note from Mr. Sager simply stating that the bus is under 3000 kg. By letter dated March 30, 2010 a "Final Notice" was sent insisting upon removal of the bus failing which it may be towed and advising that Sager's employer had been advised of the Bylaw infraction. Further letters dated May 10 and September 6, 2010 were sent demanding proof that the minibus complied with the weight restrictions again with no reference to the request for permission to park the minibus. he Applicants responded by letter of September 16, 2010 advising that they would provide proof of the minibus weight when the same was demanded upon all other unit owners who park similar size vehicles on the common property.

[3] The Applicants received a letter dated December 2, 2010 advising that the Respondent had levied a fine of $200 and would continue to levy a $200 fine each month for as long as the Bylaw continued to be breached. An email to the Property Manager dated June 11, 2011, Sager observed that no other unit owners who parked vehicles weighing more than 3000 kg had received letters alleging any violation of the Bylaw. Fines were assessed on two further occasions for a total of $600. A Caveat claiming $888.75 in condominium fee arrears was registered against the Applicants' title on May 10, 2011. This amount consisted of the $600 in unpaid parking fines together with $288.75 for the cost to register the Caveat.

[4] The Respondent caused a Statement of Claim to be filed against the Applicants on July 22, 2011 claiming $1113.75 for condominium fee arrears plus interest plus legal fees seeking *inter alia* judgment and foreclosure in default of redemption. The lawyers for the Respondent sent a letter dated August 22, 2011 to the Applicants claiming $3381.35 being $1323.46 for condominium fee arrears with the balance for legal fees and disbursements. The Applicants did not respond to the Statement of Claim and were noted in default. An application was set down for a redemption order returnable October 11, 2011. The Affidavit of Default filed in support claimed condominium fee arrears as at September 20, 2011 of $1536.32 plus legal costs. The ledger attached as an exhibit to the Affidavit indicates that there had been a further parking violation charge on June 17, 2011, a disputed NSF fee, and the Applicants were in default of making their August and September, 2011 monthly assessments. That application did not proceed as legal counsel for the Respondent had also corresponded with the Applicant's Mortgagee and consequently received payment of $4420.58 being $1750.32 representing alleged condominium fee arrears inclusive of the fines plus legal fees and disbursements. Upon receipt of the payment the action was discontinued. Despite the Applicants advising their Mortgagee that the claim for condominium fee arrears arose from a dispute over what they described as "illegal" fines, the Mortgagee made the payment as noted and instructed its legal counsel to make demand

on the Applicants as a consequence of the "default" under its Mortgage. That demand was for $6112.52 being the amount paid to the Respondents plus legal fees of $650 and a future payment of $941.94.

[5] In summary, the Applicants' claims arise from what is said to be an invalid and unlawful Caveat filed against their unit, contact with Sager's employer regarding the alleged bylaw breach violating his right to privacy, legal fees incurred from the foreclosure, imposition of inordinate financial, mental and physical stress leading to severe health problems, and inconsistent application of the Bylaws amounting to bad faith. Specifically, the conduct resulted in severe health problems for the Applicants including an attributed loss of sobriety after 20 years, the need to take stress leave from work and ultimately loss of their jobs. Kinred required counseling by a registered psychiatrist in order to deal with the stress. The result was that they were forced to make assignments in bankruptcy and sell their home at a loss. Mr. Sager also alleges that he believes the President of the Condominium Board does not like him because he is Metis.

[6] The Respondents point to a history of the difficulties with the Applicants. The Applicants filed a civil claim against the Respondents for $500 alleging that there had been negligence resulting in a flood in their basement but the Applicants did not appear at a hearing resulting in a dismissal of the action and a cost award of $100 in favor of the Respondent. Sager forwarded emails to an employer of one of the board members alleging misconduct by that board member and requesting that she not be permitted to substitute teach his daughter. He sent an email to two board members calling them names. Sager dumped garbage on the common property including a toilet bowl with a sign affixed stating it was " X's (a board member) Throne". Through a snow removal company, Sager purported to invoice the Respondent for snow removal from his walks. He sent a petition to other unit owners attempting to get the Property Managers terminated. A peace bond was allegedly granted against him in 2011 in relation to one of the board members. They observe the Applicants assigned in to bankruptcy on April 15, 2011. The reasons for the bankruptcy in their Statement of Affairs was that Sager had been laid off for 4 months in July, 2009 and subsequent reduced income.

Originating Application

[7] The Applicants filed their Originating Application on December 13, 2011. The relevant relief sought is: a declaration that the Respondent's conduct was oppressive and unfairly prejudicial to or unfairly disregarded the Applicants and that it conducted itself improperly as defined by the Condominium Property Act, s 67; return of money to the Applicants that was improperly paid by the mortgage company to the Respondent; a direction that any and all penalties issued against the Applicants be canceled; compensation for losses suffered due to the respondent's improper conduct; compensation to the Applicants for pain and suffering in the amount of $25,000; and costs on a solicitor and own client basis.

Discussion

[8] The Respondent acknowledges that it did not have a statutory priority over the Mortgagee for fines (***Bank of Montreal v Rajakaruna***, 2015 ABQB 415). It nonetheless sent correspondence to the Mortgagee stating the Applicants were in default in payment of condominium fees. The Respondent commenced foreclosure proceedings for condominium fee arrears. The Mortgagee then took legal proceedings even when told the underlying dispute arose from unproven bylaw breaches and resultant fines.

[9] The Respondent argues that the determination of the validity of the fines is now beyond question as the Applicants failed to defend their foreclosure action and noted in default. It is trite law that a defendant who is noted in default is taken to admit to the allegations in the Statement of Claim. That action was unilaterally discontinued by the Respondent and there was no adjudication on the merits. In my view when an action is simply discontinued and there is no determination by the court the principles of res judicata or issue estoppel will not necessarily apply but ought not to in this case regardless. The claim advanced improperly alleged condominium fee arrears which were in substance unproven fines. Admissions cannot create a cause of action where none exists (***Spiller v Brown,*** 1973 ALTASCAD 76). Had pleadings alleged unpaid fines issue estoppel might apply but they were not. The evidence still is inadequate to establish a breach of the Bylaw, a prerequisite to the imposition of the fines.

[10] It is also argued that the fines and the corresponding costs to enforce the fines were added to the assessment of the unit and formed a contractual charge as the legal basis for registering the caveat albeit ranking in priority below that of the Mortgage. The legal basis for this argument is said to be supported by the decision of Master Prowse in ***Condominium Plan No 8210034 v King***, 2012 ABQB 127 ("***King***") as adopted by Justice Lee in ***Condominium Plan No 0526233 v Seehra***, 2014 ABQB 588 ("***Seehra***"). In ***Seehra*** Justice Lee dealt with expenses for legal fees arising from a breach of the Bylaws involving improper use of a unit as a marijuana grow-op. Although some wording with respect to fines was included in the relevant Bylaws, he was of the view that in that situation they constituted expenses which could be assessed against the owner of the unit pursuant to those Bylaws.

[11] Since ***Seehra***, Justice Ackerl reviewed some fundamental aspects of Condominium and property law in ***Condominium Corporation No 0312235 v Scott***, 2015 ABQB 171. Material to the issues are the following excerpts:

> [16] Condominiums involve a unique form of ownership. The majority of owners control the administration and management of property in a manner that may infringe upon certain property rights enjoyed by a fee simple owner of real property :Condominium Plan No 7721806 v Gobeil, 2011 ABQB 318 at para 9. However, that authority is not unfettered.
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> [17] As creatures of statute, condominium corporations do not have the same powers as business corporations, are not treated as "persons" in the law, and can only undertake actions that the Act specifically authorizes: Condominium Plan No 8222909 v Francis, 2003 ABCA 234 at paras 26-27 [Francis]. The unit holders decide how they want their condominium run through their bylaws, and courts will not intervene unless such bylaws run contrary to the Act: Devlin v Condominium Plan No 9612647, 2002 ABQB 358 at paras 2-3 [Devlin]. Condominium corporations cannot create mechanisms or schemes that run contrary to the Act and if they do so, such actions will be invalid as they are ultra vires to the condominium's authority: Francis at para 34.
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> . . .
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> [26] There are two steps in the analysis of whether the Corporation's actions are ultra vires: The first step involves a determination of whether the rental mechanism incorporated by the Corporation complies with s 32(5) or is otherwise authorized by the Act. The second step involves an interpretation of s 32(5) of the

Act read with other provisions of the Act and the Act as a whole. The words of the Act "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of the legislature": Francis at para 25; Re Rizzo & Rizzo Shoes Ltd, [1998] 1 S.C.R. 27, 36 OR (3d) 418.

[27] In looking at what the legislature intended, it is imperative to remember that "[t]he legislature is presumed not to intend to abolish, limit, or otherwise interfere with the established common law or statutory rights, including property rights, in the absence of explicit statutory language that it intends to do so": Hamilton (City) v Equitable Trust Co, 2013 ONCA 143 at para 34, 114 O.R. (3d) 602. Moreover, in order for a court to conclude that a citizen's rights have been truncated or reduced, the legislature must do so expressly using express language in the statute: Morguard Properties Ltd v Winnipeg (City), [1983] 2 SCR 493 (SCC), at p 509.

[28] Section 32(5) of the Act does not expressly permit bylaws restricting or preventing leasing of condominium units. Nor does it contain a reasonableness standard inviting such restrictions. Its language is clear and absolute. In effect, this provision contains no articulated prohibition curtailing a substantive right to lease a condominium unit.

[29] If any provision of the Bylaws contravenes the Act then such provision will be invalid, as the Act prevails (see s 32(7)). It does not matter whether unit owners consented to an invalid provision or that it was acted on. As noted by the Court of Appeal in Francis (at para. 35), "An ultra vires act is an illegal act and it remains such even if it is acted on over the course of time or on separate consecutive occasions".

[30] Courts have long recognized that the right of alienation includes the right to lease one's property: Devlin at paras 15-21.

[12] The ***Devlin*** paragraphs mentioned are as follows:

[15] In the case of Capitalize Peel Condominium Corp. No. L v. Caroe et al (1974), 48 D.L.R. (3d) 503 at p.504 Galligan J. stated:

> "If the declaration is given the meaning which the applicant contends it ought to be given, then as a practical matter there would be substantial restriction imposed upon the very nature of the ownership that rests in the owner. One of the fundamental incidence of ownership is the right to alienate the property that one owns. With respect to real property the right to freely alienate dates to 1290, when the imperial statute of Quia Emptores,18Edw.I was an act. The provision of that statute were made part of the law of Ontario in 1897 (R.S.O.1897, c 330 (see Anger v. Honsberger, Canadian Law of Real Property (1959), p. 21.)"

[16] Earl Jowitt, in the dictionary of English Law, at p. 1284, considered the ownership in the following terms:

> "Ownership is a essentially indefinite in its nature, but in its most absolute form, it involves the right to posses (sic) and use or enjoy the thing, the right to its produce and accessions and the right to destroy, encumber, or alienate it."

[17] Pearson, J., in Re Rosher (1884), 26 Ch. D. 801 p. 818:

> "There are various modes of alienation besides sales; a person may lease or he may mortgage, or he may settle". The rights to lease ones property is therefore one of the important ingredients of absolute ownership.

[18] Under the Condominium Property Act revised statutes of Alberta 1980, c - 22 with amendments in force as of September 1, 2000, specifically:

> s. 26(1) provides that the bylaw shall 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.
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> s. 26(4) no bylaw operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage or other dealing with them or to destroy or modify any easement implied or created by this Act.

[19] The very nature of condominium construction would indicate that some restrictions on the use and occupancy of the individual units, such as provisions for one family occupancy, age restrictions of unit owners, anti-commercial use and the like, should be permitted in the restrictive covenant, however, I cannot see how the legislature could have intended to take away any fundamental right of an owners right of alienation of his freehold state.

[20] The Alberta legislature has incorporated the right of lease of the condominium unit in s. 26 (4) of the Act. The language is unambiguous and is clearly set out which allows the legal right of the owner of the estate in fee simple to lease his condominium unit.

[21] Madam Justice Romaine found that bylaw 212(b) restricting leasing, was void and unenforceable on February 6th, 2002 and in violation of s. 26(4) of the Condominium Property Act.

[13] I note Justice Power's reference in para 18 of ***Devlin*** to s 26(4) (now s 32(6) of the *Act*) restricting the operation of bylaws which in my view expressly prohibits the creation of a charging provision in the bylaws. If I am wrong in that interpretation, then regardless absent express statutory authority the purported ability to have an inchoate floating charge (mortgage) granted through bylaws for something other than contributions levied in accordance with s 39(1)(a, b, & c) of the *Condominium Property Act* is ultra vires the *Act*, constitutes an unauthorized restraint on alienation of an owner's property and therefore void. Furthermore, the restriction relating to bylaws is expressly made in relation to sanctions for failure to comply with bylaws at s 35(6) of the *Act*:

> (6) A sanction may not be imposed that has the effect of prohibiting or restricting the devolution of units or any transfer, lease, mortgage or other dealing with the units or of destroying or modifying any easement implied or created by this Act.

[14] It is clear that a provision which purports to authorize a charge against an owners unit for a sanction contained in the bylaws of a Condominium Corporation would be ultra vires the Act and also void. As noted by Master Schulz in ***Bank of Montréal v Bala***, 2015 ABQB, ***Seehra*** appears at odds with the reasoning of the Alberta Court of Appeal in ***Francis*** if applied in the context of the capacity or vires of a Condominium Corporation to create charges on land not expressly authorized by statute. Although the Act was amended following ***Francis***, it does not expand the definition of "contributions" but allows for contributions to be levied other than in proportion to unit factors if provided for in the Bylaws. Regardless, ***Seehra*** deals with expenses but here it is fines or sanctions that are in issue. Finally, the fatal flaw in this argument of the Respondent is that even if they were permissible there is no provision in its Bylaws which permits the adding of expenses or fines to an assessed contribution nor do the Bylaws purport to create a contractual charge on an owners unit for such things.

[15] The Applicants paid their Mortgagee $6112.52 but of that amount $941.94 was for a future Mortgage payment and two overdue monthly assessments of $209.71 each (postdated cheques were provided but not negotiated). The balance of $4751.16 was for the unproven fines, registration and legal costs associated with enforcement of those fines and legal costs incurred by the Mortgagee. More legal costs may have been paid to the Mortgagee but of that there is no evidence. Regardless, the Respondent has not established an entitlement to those amounts and furthermore their actions caused the $650 in legal costs to arise that had to be paid by the Applicants to the Mortgagee.

Misconduct

[16] The Applicants have alleged improper conduct under s 67(1) of the *Act* in their application. The Respondents say that Sager is also guilty of misconduct but have brought no application seeking relief. ***Scott*** is again helpful in setting out the law in that regard:

> [44] In the application and cross-application, the Corporation and the Scotts accuse each other of improper conduct under s 67(1) of the *Act* and each seeks the relief delineated in s 67(2). Subsection 67(1)(a)(i) states that non-compliance with the *Act* is improper conduct. Subsections 67(1)(a)(ii)-(v) refers to conduct that is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party".
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> [45] In considering whether conduct falls within the ambits of subsections 67(1)(a)(ii)-(v), the court can consider corporate oppression principles: ***Laasko v Condominium Corp No 8011365***, 2013 ABQB 153 [***Laasko***]. In ***934859 Alberta Inc v Condominium Corp No 0312180***, 2007 ABQB 640, 434 AR 41, Chrumka J canvassed the meanings of various words and phrases found in subsections 67(1)(a)(ii)-(v):
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> > 93 Oppression or oppressive conduct… has been defined to be conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing.
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> > 94 The term "unfairly prejudicial" has been defined to mean acts that are unjustly or inequitably detrimental.

> 95 The term "unfairly disregards" may be defined as unjust and inequitable. Unfairly itself has been defined as "in an unfair manner, inequitably, unjustly." Fair has been defined as "just, equitable, free of bias or prejudice, impartial." Prejudice means "injury, detriment or damage caused to a person by judgment or action in which the person's rights are disregarded: hence injury, detriment or damage to a person or a thing likely to be the consequence of some action". Prejudicial means "causing prejudice; detrimental damaging "to rights, interests, etc."
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> …
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> 97 The term "significantly unfair" encompasses conduct that is oppressive, unfairly prejudicial or which unfairly disregards the interests of an interested party.

[46] As noted by Wilson J in ***Laasko*** at para 26,

[A] two-pronged approach in analysing the oppression remedy is required. The decision of ***Metropolitan Toronto Condominium Corp No 1272 v Beach Development (Phase II) Corp***, [2010] OJ No 5025 (Ont SCJ) is helpful in this regard. Two paragraphs are reproduced here:

> 13 In ***BCE Inc v 1976 Debentureholders***, 2008 SCC 69, [2008] 3 SCR 560, the Supreme Court held that the best approach to analyzing the oppression remedy is a two-pronged test. At the first stage, the Plaintiffs must establish a breach of reasonable expectations. If successful, the court must go on to consider whether the conduct complained of amounts to oppression, unfair prejudice or unfair disregard.
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> 19 The concept of reasonable expectations is objective and contextual, taking into account the facts of the specific case, the relationships at issue and the entire context. The actual expectation of a particular stakeholder is not conclusive. The Plaintiff must identify the expectations that were allegedly violated and establish that those expectations were reasonably held, based on factors that may include general commercial practice, the nature of the corporation, the relationship between the parties, steps that the claimant could have taken to protect itself, the fair resolution of stakeholders' conflicting interests and, importantly, representations and agreements.

[47] Upon satisfaction of this two-fold obligation, the Court will then determine whether the conduct complained of did, in fact, amount to oppression, unfair prejudice or unfair disregard.

[48] If the court finds improper conduct, whether it be through non-compliance with the *Act* or through conduct that is oppressive, unfairly prejudicial, or unfairly disregards the interests of an interested party, then it may grant the s 67(2)

> remedies. These remedies are discretionary: ***Leeson v Condominium Plan No 9925923***, 2014 ABQB 20 (Master), at para 19 [***Leeson***].

[17] The Applicants may be awarded compensation if they suffered a loss due to the improper conduct (s 62(2)(d)). I am satisfied that the amount of $4751.16 as described above is payable to the Applicants.

[18] There is however other misconduct alleged and a claim for compensation for additional losses and for pain and suffering in the amount of $25,000. The evidence provided to establish pain and suffering is a doctor's note saying Kinred needed to take time off work due to stress. Sager says she had to take a leave of absence due to stress from the foreclosure and had in fact stopped working. Sager missed two days from work due to stress but can't find his doctor's note. He says the ongoing threat that the bus would be towed and the foreclosure caused him to start drinking again. Neither presented any evidence connecting the stress and the alleged consequences to the conduct of the Respondent other than Sager saying so. The claim for the loss on the sale of the home is supported by no evidence. The bankruptcies of the Applicants took place before the caveat was filed and legal proceedings commenced. The cause in their sworn Statement of Affairs was a loss of employment in 2009 and lower paying employment thereafter. No mention is made of stress or its impact arising from the more recent disputes with the Respondent. Advising Sager's employer of the risk of its vehicle being towed even if it can be characterized as a breach of privacy did not result in loss of employment or other financial loss. Failure to expressly respond to his request for permission to park the bus on common property seems trifling as the further demands that it not be parked there made the view of the Respondent self- evident. There is also the complaint that others weren't being called upon to prove their vehicles were compliant. The evidence is no more conclusive as to the "other vehicles" exceeding the weight limit than for the bus. Finally, the conclusion from Sager that he thinks the President of the Respondent didn't like him because he is Metis without more is unhelpful.

[19] The Respondent counters saying that Sager was also guilty of misconduct and behaved with a combative nature. The specifics are set out above and do not warrant repeating. Owners ought not to be surprised when having been difficult in the past that condominium boards may not be quick to respond to their concerns and needs. That is not to say that it would be justification to ignore an owner or apply bylaws differently to that owner. The condominium board must rise above the street yard fracas and adhere to the principles of fairness as prescribed by the Act.

[20] Although there was oppressive conduct as it related to the filing of the caveat and the foreclosures, the evidence is simply inadequate to establish those events as the cause of the further injuries described by Sager. Furthermore, no evidence is provided to establish the quantum of the alleged damages. Much of the alleged misconduct has a *de minimus* quality. As noted in ***Leeson*** any remedy of the Court is discretionary, and these even if proven would, at best, attract only nominal damages.

Conclusion

[21] I award compensation of $4751.16 to the Applicant for the losses arising from the oppressive misconduct connected to the fine, caveat and foreclosure proceedings as already

described. I am unable to conclude that any further loss has been suffered by the Applicants as a consequence of the conduct of the Respondent.

[22] The Applicants will have their costs of the application.

Dated at the City of Edmonton, Alberta this 2nd day of September, 2015.

L.A. Smart
M.C.C.Q.B.A.

Appearances:

Roberto Noce
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