Court of Queen's Bench of Alberta

Citation: The Owners Condominium Corporation No. 0211096 v Clayton, 2019 ABQB 877

Date: 20191115
Docket: 1901 03566
Registry: Calgary

Between:

The Owners Condominium Corporation 0211096

Applicant

- and -

Brenda Clayton and Gerald Clayton

Respondents

Memorandum of Decision
of
J.L. Mason, Master in Chambers

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[1] Brenda and Gerald Clayton own and reside at a unit of the Iron Horse Condominiums in Airdrie, Alberta. They have a dog. Condominium Corporation 0211096 applies for an order that they re-locate the dog, as it is in breach of the condominium bylaws and pet policy.

Legislation, bylaws and pet policy

[2] Section 32(2) of the *Condominium Property Act*, RSA 2000, c C-22 provides that the owners of condominium units and anyone in possession are bound by the bylaws.

[3] Section 37(1) confirms that a condominium corporation is responsible for the enforcement of its bylaws.

[4] Section 67 provides that non-compliance with bylaws falls within the meaning of "improper conduct", and gives rise to the court's ability to grant a remedy.

[5] Article 58(b)(iii) of the Condominium Corporation bylaws passed in 2002 state:

> 58(b). An Owner shall not:
>
> > (iii) keep or allow any animal, livestock, fowl or pet of any kind (other than birds, fish or small animals restrained at all times inside the Unit) at any time to be in his Unit or on the Common Property without the specific approval in writing of the Board, which approval the Board may arbitrarily withhold and may, if give [sic], be withdrawn at any time on seven (7) days notice to that effect. All dogs approved must be hand leashed and kept under control at all times.

[6] The Condominium Corporation subsequently adopted a pet policy which provided that:

> **As of June 18, 2015, dogs are no longer permitted in any of the Iron Horse Condominium Buildings. Previously existing dogs will be grandfathered in.** [emphasis in original]
>
> …
>
> Effective as of July 1, 2015 - all pets must be registered with Astoria Asset Management Ltd. A maximum of two Pets are permitted in each household. We will only grandfather in those pets that are registered prior to July 1, 2015. Failure to register your pet will result in the eviction of the pet from the property in accordance with the bylaws.

[7] Article 3 of the bylaws states:

> 3. An owner shall:
>
> (l) comply strictly with these By-Laws and with such rules and regulations as may be adopted pursuant thereto from time to time and cause all adult occupiers of and visitors to his Unit to similarly comply.

[8] The Claytons do not challenge the validity of the bylaws or the pet policy. Counsel agree that the policy was adopted following problems with dogs at the complex, although that was not addressed in the evidence before me.

The Claytons' dogs

[9] The record indicates that the Claytons have owned three dogs over the 17 years they have lived at the complex. Mrs. Clayton states in a letter she wrote to the Condominium Corporation following the Condominium Corporation's written notification of their breach in June of 2018:

> In 2000 we purchased our condo. We carefully selected our unit to suit our lifestyle, which included our dog. We were assured at the time that our dog was allowed.
>
> We moved in on March 9, 2002 with our dog. When our dog passed away in 2008, we [purchased] another dog, which was registered with Astoria Management, a blonde Cocker. In August 2017 my youngest son died suddenly. One month later our Cocker was diagnosed with cancer and we had to put him down. We replaced him with another blonde Cocker and unfortunately we did not see the need to contact anyone to get approval or re-register him, as we had been approved for a dog since 2000.

> At an AGM meeting in the spring of 2018 it was the first time we heard that dogs were no longer allowed in the Iron Horse condos. Until that moment I had always understood that we were grandfathered in …

[10] The Claytons purchased their dog in February of 2018. The board received notice of the dog in May of 2018. By letter dated June 26, 2018, the board issued notice to the Claytons to remove the dog. In October of 2018, Mrs. Clayton advised the property manager that she had no intention of getting rid of her dog. A further notice was issued to the Claytons on November 8, 2018. The dog remains.

Pet tolerance at the complex and communication of pet policy

[11] A relaxed or casual approach to pet regulation may inform the fairness of a decision to require an owner to remove an unauthorized pet: see for example, ***Condominium Plan No. 76201302 v Stebbing***, 2014 ABQB 487; ***Niagara North Condominium Corp. No. 46 v Chassie***, 1999 CanLII 15035 (ONSC).

[12] The Claytons submit that after years of a relaxed approach to pet ownership and registration, the board decided to strictly enforce the bylaws against them. They argue that the pet bylaw was not enforced between April 2002 and 2015. They rely on the following paragraph contained in Mr. Clayton's affidavit:

> 5. During our time living and occupying our condominium unit, we have observed numerous condominium unit owners who are pet owners and specifically dog owners. At times these pets were not confined to the owners' unit and were unleashed in the common areas.

[13] In the time period referenced by Mr. Clayton, dogs were allowed with the approval of the board of the Condominium Corporation. His affidavit does not provide evidence of the Condominium Corporation's lack of enforcement of the approval requirements of the pet bylaw. Evidence of observing a pet outside a unit or unleashed in common areas is not tacit approval of unapproved pets. It reflects the difficulties faced by a volunteer board of a Condominium Corporation in policing pet behaviour, which is necessarily complaint-based.

[14] Condominium Corporation board member Suzanne Verdi swore an affidavit in support of this application and was questioned in advance of the application. She did not have knowledge as to the manner in which the pet bylaws were enforced by the board prior to her tenure as a board member. Counsel for the Claytons advised at the hearing that she undertook to make inquiries as to records in this regard, but that such records were not available.

[15] The record suggests that following the adoption of the pet policy, when non-compliant pet activity came to the Condominium Corporation's attention, it acted on those complaints. The Condominium Corporation has obtained orders for declarations of breach of the bylaw relating to unapproved pets and the removal of those pets from the owners' units, in 2017 and 2018.

[16] The Claytons further submit that registration of pets was never a firm requirement, and rely on the following statements by Mrs. Clayton:

> 7. I do not recall registering our dogs with the apartment building.
>
> 8. The first I recall being made aware of the building enforcing a rule about registration is when I had received a notice that I was going to be penalized for a "black boxer" running at large. I had to explain to the manager Kara Bocking that we have never owned a black

> boxer. When we spoke with her, she then verbally told us that our dog (which was a blond cocker spaniel) was not registered with the apartment and should be.

[17] While it appears that Mrs. Clayton no longer recalled registering her dogs at the time she swore her affidavit on July 26, 2019, her letter to the Condominium Corporation reproduced above acknowledges that they registered their prior dog with the property manager. It appears that this occurred when their dog came to the attention of Kara Bocking, who was following up on a complaint concerning dog behaviour.

[18] In 2015, the board supplied written notice of the pet policy to the residents of the complex. Board member Ms. Verdi received two notices, as she owned two units in the different buildings of the complex at the time. As referenced above, the pet policy adopted by the board was that only dogs in existence as of July 1, 2015 could be grandfathered and permitted to remain, as part of a transition to a "no dog" complex.

[19] The Claytons maintain that they did not receive a written copy of the pet policy at that time. The Condominium Corporation is not in a position to provide specific evidence of the Claytons' receipt of the written policy.

[20] However, Mrs. Clayton acknowledges attending the 2016 AGM at which an announcement was made about new rules for dogs and owners. This meeting occurred prior to the Claytons' purchase of their current dog.

[21] Mrs. Clayton deposes that they were assured at this meeting that current owners of dogs would be "grandfathered in". She says she "had the understanding based on the wording of this announcement" that "the new rule would not affect our home as we had always been dog owners and had owned our property since before construction of the building was started". In other words, she understood that rather than existing *dogs* being grandfathered, that *owners*, especially original owners were grandfathered.

[22] Mrs. Clayton further states that since this litigation started, she spoke to several neighbours who shared her understanding of the owners being grandfathered, not the dogs. She did not supply any meaningful detail or documents to support this assertion, including the written confirmation that she says they supplied. Mrs. Clayton says that it was not until the April 2018 AGM (after they had purchased their current dog) that it was "explicitly stated that we were no longer allowed to bring in new dogs".

[23] The minutes of the 2016 AGM are a contemporaneous and reliable record of what was communicated to the residents at that time. Paragraph 10 of the minutes state that the property manager's representative, Daryl Talbot:

> … indicated that the dog policy from the board is that **all new dogs must be approved**, and **the board is not granting approval to any new dogs**. **Old dogs are grandfathered**. Unit owners/renters should notify [Daryl Talbot] if they suspect a breaking of this rule. If possible take a picture. [Board member John Roberston] indicated that we need unit owners and renters ... to help us on the board by being the 'eyes' on infractions, and notify Astoria. Violations of condo policies cost all of us in our condo fees. [emphasis added]

[24] Given this wording, it is not clear to me how Mrs. Clayton formed the understanding that all current owners of dogs would be grandfathered, rather than the existing dogs. It is possible that as a long-time dog owner, she heard what she wanted to hear. I do not consider her

misunderstanding to be the board's responsibility, or demonstrative of unfair treatment by the board.

[25] It is most unfortunate that the Claytons did not understand that the board was no longer granting approval for dogs. However, they were made aware that their prior dog (who was in existence at the time that the pet policy was adopted and accordingly was entitled to be grandfathered) had to be registered with the property manager, and they proceeded to do so. They have never claimed to be unaware of the pet bylaw, which requires board approval for pets. When they purchased their current dog in 2018 (which Mr. Clayton deposes is "almost identical" to their prior dog), they neither sought the board's approval, nor did they attempt to register it with the property management company.

[26] To permit the Claytons to keep their dog in these circumstances would be unfair to other residents who follow the bylaws and policies of the Condominium Corporation and who are entitled to expect the Condominium Corporation to enforce them, as required under the *Condominium Property Act*. It could also impair or limit the Condominium Corporation's ability to enforce the rules of the complex in the future.

[27] The Court is very sympathetic to the Claytons' situation. It is apparent that their dog is a cherished member of their family. But that is not a sufficient reason to dismiss the application of the Condominium Corporation in the circumstances.

[28] ***Stebbing*** is distinguishable. While that case similarly involved a formerly pet-friendly building which subsequently adopted a "no cat" policy, there was "very strong" evidence that the board was not operating carefully in relation to pets (at paragraph 43). Justice Ackerl also noted earlier in his reasons (at paragraph 38) that the presence of cats already in the building when the Board began strict enforcement of its bylaws was a consequence of the board not meeting its obligation to enforce condominium bylaws upon becoming aware of a breach. That is not the situation here on this record.

[29] Justice Ackerl was able to infer from the facts before him that the board communicated in writing that the owner's cats had been approved, and led to her moving into the building with the honest belief that she had received formal approval to live there with her cats. He found that at the time, the board did not consider permission to keep cats as a serious topical issue, and either never documented that fact or lost the record. He concluded that the board's subsequent refusal to grandfather the owner's cat that had been approved and was eligible for grandfathering under the pet policy was oppressive and unfair under section 67 of the *Condominium Property Act* and the product of the board's negligence or poor internal communications. Again, that is not the situation here.

[30] He further found that even if the board had not granted permission for the owner's cats, the board knew about the cats and the absence of written permission in 2010, yet did nothing about it until 2012. Had the board acted in a timely way, the owner could have applied for approval and would have received it which would have allowed the owner's surviving cat to be grandfathered. He additionally held that the two- year limitation period is a marker for when inaction on a minor breach of bylaws should be presumptively viewed as "improper conduct". Here, the board acted promptly.

[31] Justice Ackerl also held that the owner had a mistake of fact defence for her actions. She knew exactly what the bylaw requirements were, and to the best of her knowledge had complied

with them. She thought she had permission from the board. Here, however, the Claytons knew of the approval requirement in the bylaws and knew that they did not request or receive approval. They registered their prior dog, and accordingly had knowledge of this requirement before purchasing their current dog, but did not register their current dog.

[32] Justice Ackerl found that the board's decision to treat the owner's cat differently from the other grandfathered cats was unfair, unjust and unreasonable. There is no evidence that the Claytons' dog is being treated differently than the dogs of other residents in the complex.

[33] The Claytons also encouraged the Court to conclude that it is unreasonable for the Condominium Corporation to have rules excluding ownership of pets, on the strength of comments made by the Ontario Superior Court in ***Chassie***. I decline to do so. The role of the Court in this application is to consider whether the relief sought by the Condominium Corporation is appropriate in these particular circumstances.

[34] This is not a case of the board of the Condominium Corporation taking a casual approach to the enforcement of its rules and regulations, or unreasonably enforcing them. It is a case of a couple who misunderstood the rules and in the throes of personal tragedy, purchased a new dog without getting the requisite approval of the board, or registering the dog.

Support/service dog

[35] Mr. Clayton deposes that their dog was purchased as a "support dog" for Mrs. Clayton and is registered as a support dog under the Assistance Dogs of America organization.

[36] The Condominium Corporation has obtained confirmation from the Alberta Service Dogs Assessment Team that this is not an accredited organization under the *Service Dogs Act*, SA 2007, c. S-7.5 or the Minister's Qualified List of accredited organizations. Thus, the Claytons' dog does not meet the requirements of a qualified service dog under the *Service Dogs Act*, or the *Service Dogs Qualified Regulation*, AR 59/2017.

[37] The Claytons concede that the dog does not qualify as a service dog under Alberta legislation. However, they rely on the fact that Mrs. Clayton looks to the dog for emotional support and ask for the Court's consideration of that fact in determining whether the dog should be removed. Mrs. Clayton's affidavit is silent on this topic, but her letter to the board resisting its request to remove the dog states that she has:

> … registered her dog as a support dog and have letters from my doctor and psychiatrist stating that he is meeting that need for me.

[38] The referenced letters are not included in this record.

[39] Again, while it is apparent that the dog is an important member of the household, the fact remains that the dog was acquired in breach of the pet bylaw and based on the Claytons' misunderstanding of the pet policy that was not caused by the Condominium Corporation.

[40] In the circumstances, including the absence of a service dog designation recognized under Alberta legislation, the decision of the board to pursue the dog's removal was reasonable and entitled to deference from the Court.

Conclusion

[41] The Condominium Corporation's application is granted.

[42] There is no evidence that the Claytons' dog is being allowed off leash or disturbing other residents. In the circumstances, the Claytons shall have until February 29, 2020 to find a new home for their dog.

[43] Prior to that date, the Claytons are at liberty to pursue designation of their dog as a service dog and submit it to the board for its consideration.

[44] If the parties cannot reach an agreement as to costs, they shall supply a list of dates that they are both available to address that topic to the Masters' office.

Heard on the 12th day of November, 2019.
Dated at the City of Calgary, Alberta this 15th day of November, 2019.

J.L. Mason
M.C.Q.B.A.

Appearances:

Corey Critch
Scott Venturo Rudakoff LLP
for the Applicant

Adam S. Benzari
Benzari Law
for the Respondents