Court of Queen's Bench of Alberta

Citation: Condo Corporation No. 1311010 v Demyanenko, 2021 ABQB 426

Date: 20210531
Docket: 210102622 & 200114338
Registry: Calgary

2021 ABQB 426 (CanLII)

Between:

Condominium Corporation No. 1311010

Applicant

- and -

Elena Demyanenko and Sergey Demyanenko

Respondents

And Between:

Elena Demyanenko and Sergey Demyanenko

Applicants

- and -

Catalyst Condo Management Ltd.

Respondent

Endorsement
of the
Honourable Madam Justice M.D. Slawinsky

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[1] These applications were heard together in Special Chambers. In the first application, Condominium Corporation No. 1311010 (the Corporation) seeks to gain entry to the condo unit owned by Elena and Sergey Demyanenko (the Demyanenkos) to perform routine preventative maintenance to the building's plumbing system. The Demyanenkos refuse to provide access to their unit to the Corporation. They dispute that access to their unit is necessary, and question whether the proposed work has been approved by the Corporation's condo Board.

[2] In the second application, the Demyanenkos seek a restraining order against Catalyst, the management company hired by the Corporation to manage the day to day operations of the condo building. The Demyanenkos allege that Catalyst twice unlawfully tried to gain access to their condo unit, and that a physical altercation ensued during the first attempt. The Demyanenkos also believe that Catalyst has been entering their unit and stealing their personal confidential documents, and that Catalyst has disclosed their private confidential information to another company. The Demyanenkos state that they are fearful of Catalyst. During argument in

court, the Demyanenkos also alleged that Catalyst caused a false foreclosure action to be started against them, and that they believe Catalyst is trying to take their property from them.

[3] Catalyst's position is that it is not the proper party to be sued, that it was not present for either attempted entry to the unit, and that it simply makes arrangements on behalf of the Corporation and carries out the Corporation's instructions.

[4] The Demyanenkos' first language is Russian. Mrs. Demyanenko has a good command of the English language. She very capably prepared the Demyanenkos' filed documents in English, and made submissions on behalf of the Demyanenkos in English. Mr. Demyanenko does not appear to have any understanding of English. The couple brought an interpreter to the court hearing, but when Mr. Demyanenko spoke, he was very animated, spoke at great length and rarely gave the interpreter a chance to adequately interpret for the Court. Consequently, I reserved my decision on both applications so I could review in detail the contents of both of these court files, which I have now done, and so that I could issue an endorsement which will provide the Demyanenkos with written reasons for my decision.

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[5] Both applications involve the same relevant facts. The Demyanenkos have owned their ground floor condo unit since 2013. Since at least 2018, Catalyst has been the management company hired by the Corporation to manage the building operations and make arrangements for services, maintenance, repairs, etc. that the Corporation is obligated to provide under its Bylaws. Catalyst acts as agent on behalf of the Corporation, and with few exceptions, it is the Corporation who is ultimately responsible for Catalyst's actions under the management agreement.

[6] In July, 2020, the Corporation hired Flo Pros Drain Services Inc. (Flo Pros) to clean the plumbing stacks within the building as routine preventative maintenance work, to prevent backups in the sewer system. Catalyst gave notice to the residents of the building several times by email. The Bylaws allow for this, if the residents have provided an email address to Catalyst. The Demyanenkos did not provide an email address, so they did not receive the notice.

[7] Catalyst deposed through its representative Angie Norman that it also posted notice of the stack cleaning throughout the building. There is no evidence confirming that any of these postings were actually seen by the Demyanenkos. I note that their unit is on the ground floor of the building, and that they have both a front door as well as a patio door for entry and exit. It is possible they did not see the notices, and in any event, this does not constitute proper notice under the Bylaws.

[8] Without having an email address, the Bylaws require notice to be given to a unit owner by personal delivery, or by leaving it with some other adult person at the unit, or by putting it under the front door of the unit, or be sending it by prepaid mail to certain addresses (the unit, other known addresses, or the address listed on the Certificate of Title of the unit). Notice sent by prepaid mail is deemed effective 48 hours after being mailed. None of these alternate methods of service were done by either the Corporation directly or by Catalyst on behalf of the Corporation.

[9] On July 25, 2020, Flo Pros tried to enter the Owner's unit to clean the plumbing stacks. They could not get access. There is no evidence from anyone that explains in any greater detail this failed attempt.

[10] Acting on the Board's authorization to hire a locksmith, Catalyst then arranged for a locksmith to attend. At approximately 7:00 pm on Saturday, July 25, 2020, the locksmith and an

employee of Flo Pros went to the patio doors of the Owner's unit and drilled out the lock to enter the unit. They were confronted by Mr. Demyanenko, a physical altercation ensued, and the locksmith and Flo Pros employee retreated. The police were called. They attended and investigated. The police explained to the Demyanenkos who the people were and why they were there. After they left, Mrs. Demyanenko called for an ambulance for her husband. He was taken to the hospital, examined and released within a couple of hours.

[11] There is conflicting evidence about the physical altercation, with each side alleging that the other was the instigator of physical violence and that injuries on both sides occurred. I make no findings about what actually happened, as I am able to reach a decision on these applications without doing so, and I cannot resolve the conflicting stories on affidavit evidence. That would require oral evidence if it was necessary to resolve some outstanding claim.

[12] In November, 2020 the Demyanenkos sued Catalyst for $500,000, alleging that Catalyst unlawfully claimed debts against them, released their confidential information to others, unlawfully accepted a cheque from a third party for their outstanding condo fees, and caused them personal injuries. Catalyst defended in December, 2020.

[13] At around the same time, Catalyst sent the Demyanenkos a letter telling them that the Corporation needed to access their unit to complete the cleaning of the plumbing pipes. The letter was also translated into Russian. The Demyanenkos depose that they never received this letter, and that the registered mail receipt produced by Catalyst is for service of Catalyst's Statement of Defence in their lawsuit. This seems to be corroborated by a letter sent from the Demyanenkos to Catalyst's lawyer acknowledging receipt of the Statement of Defence. I note as well that the Calgary Police Service records suggest Angie Norman told them a letter had been sent by courier to the Demyanenkos, not by registered mail. There would appear to be an issue as to whether the December 2020 letter was received by the Demyanenkos.

[14] In any event, even if the Demyanenkos did receive the letter, it is clear that the letter does not specify any particular date for access to their unit. The Bylaws require a minimum of twenty-four hours written notice except in emergent circumstances, in addition to another forty-eight hours for service by post. This means that a letter giving notice of entry must be mailed at least seventy-two hours before the intended entry. I infer from the Bylaws that a specific date for entry is required as part of any notice. The letter, even if received by the Demyanenkos, was again insufficient notice.

[15] On January 29, 2021, Flo Pros was again sent to the Demyanenkos' unit, this time with a locksmith and RCMP assistance, which Catalyst had requested in advance. The locksmith drilled the lock, but they could not enter the unit as something on the inside was preventing the door from being opened. The Demyanenkos state that they were not home at the time, and returned to find their door handle on the floor in the hall.

[16] The Demyanenkos then applied for a Restraining Order against Catalyst, and the Corporation subsequently applied to get access to the unit.

[17] Clearly, mistakes have been made by Catalyst in carrying out the Corporation's instructions and in making the necessary arrangements to fulfill its obligations under the management services agreement with the Corporation. The Demyanenkos did not receive proper notice either time that Flo Pros tried to enter the unit, which the Corporation and Catalyst both admit.

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[18] I understand why the Demyanenkos would have been surprised and scared when the locksmith broke into their patio doors at 7:00 pm on a Saturday night, without knowing the reason behind the entry. I also understand why they would think the second attempt might have looked like another attempted break in. These misunderstandings and failed attempts to carry out maintenance work could have been avoided if the Corporation, through Catalyst, had complied with its own Bylaws.

[19] Just as clearly, however, the Demyanenkos are also bound by the Bylaws, as set out in s. 32(2) of the *Condominium Property Act*. They are required by the Bylaws to allow the Corporation and its agents, which includes Catalyst, to enter their unit at all reasonable times on a minimum of twenty-four hours notice for the reasons set out in section 3(a) of the Bylaws. This includes maintenance of the plumbing stacks.

[20] The Demyanenkos dispute that the work to be done by Flo Pros is necessary, and they demand proof that the condo Board of the Corporation approved this work. They also say that they will be responsible for maintaining the plumbing in their own unit.

[21] However, the Bylaws do not require the Corporation to provide the Demyanenkos with proof of approval, or detailed explanations or justification for the work being done. This would be onerous, costly and time consuming if the Corporation had to provide such information to every unit holder. The Corporation is responsible to make sure the systems in the building operate properly and remain in good condition. This is for the benefit of everyone that lives in the building.

[22] It is obvious that condo buildings contain pipes, ducts, cables and other mechanical equipment that service multiple units, and that they cannot properly be maintained or serviced by individual unit owners. The Bylaws require the Corporation to do the work, which Catalyst arranges through its management services agreement. If systems break down or fail, the Corporation could be liable to the other 281 unit holders in the building for damages they might sustain. If the necessary maintenance cannot be completed because the Demyanenkos refuse access and a system fails, the Demyanenkos could be liable to the Corporation and to other unit holders. That could ruin the Demyanenkos financially.

[23] I do not necessarily agree with Catalyst that they have no role in this dispute. Catalyst scheduled and arranged the locksmiths, the plumbing contractor and the RCMP. Catalyst communicates with the unit holders and gives notices for access, and in this case gave deficient notice or no notice at all. From the Demyanenkos' perspective, it would be hard for them to understand the legal relationship between the Corporation and Catalyst, or to distinguish between the two.

[24] However, in all of the circumstances, I am not convinced that a Restraining Order against Catalyst is necessary or appropriate. As recognized in *RP v RV*, 2012 ABQB 353 at paragraph 33, while the Court has wide discretion to grand equitable remedies, a common law restraining order should not be granted unless the applicants have "sufficiently demonstrated a reasonably held and legitimate fear for his or her safety, the safety of any other person under his or her care or the safety of his or her property as a result of the respondent's harassing, intimidating, molesting, threatening or violent behaviour." I am not satisfied that is the case here.

[25] The attempts by the locksmith and Flo Pros to access the condo unit were for legitimate purposes, which the Demyanenkos would have to allow if proper notice were given. Entry,

either voluntary or by locksmith assistance, is authorized by the Bylaws and therefore cannot be harassing, intimidating, molesting or threatening behaviour. The real issue is the lack of proper notice. The Corporation attempted through Catalyst to give notice of the need to enter the unit. While those attempts were deficient, they were not malicious or intentionally designed to create a threatening situation. The Demyanenkos may well have subjective fears as a result of these events, but they are not objectively reasonable in these particular circumstances and do not support the need for a restraining order against Catalyst. There is also no reliable evidence to support their belief that Catalyst has been entering their unit and stealing their personal confidential documents, that Catalyst has disclosed their private confidential information to another company, that Catalyst caused the Royal Bank to start a mortgage foreclosure action, or that Catalyst is trying to take their property from them.

[26] Given the history of this matter, the ongoing conflict between the Demyanenkos, Catalyst and the Corporation, and the need for Catalyst to continue to manage the building to fulfil its contractual obligations, the most prudent approach would be to set out specific guidelines for all parties to follow on a go forward basis. This will ensure that all parties can carry out their duties under the Bylaws, and the Demyanenkos can peacefully enjoy their home.

[27] I therefore make the following directions that will apply each time the Corporation, either directly or indirectly through Catalyst or any other agent, require non-emergent access to the Demyanenkos' unit under section 3(a) of the Bylaws (these directions do not apply to emergent circumstances, and I make no specific directions regarding access to the unit in the case of an emergency). For non-emergent access:

1. Written notice must be given to the Demyanenkos in strict accordance with one of the methods of service of notice set out in section 53 of the Bylaws. If the notice is sent by prepaid mail, it must be registered mail.
2. Notice must be given a minimum of twenty-four hours in advance, and must allow an additional forty-eight hours from the time of mailing if it is served by registered mail. Service by registered mail is therefore effective seventy-two hours after mailing, even if the Demyanenkos do not pick up the mail. It is their responsibility to pick up their mail.
3. The Notice must specify the specific day that access is required.
4. The Notice must specify the work to be done, what company is doing the work, and provide a general description of the reason for the work.
5. The individuals attending to perform the work must comply with any public health orders that may be in place at the time of access related to the Covid-19 pandemic. They must enter and exit only by the front door to the unit, and must not arrive before 8:00 am or after 8:00 pm.
6. If the Demyanenkos are inside the unit at the time of access, they must provide entry to the individuals attending to perform the work.
7. If the Demyanenkos are not home, they must not barricade or secure the front door to their unit on the day of access in such a way as to prevent the door from being pushed open after being unlocked. If the Demyanenkos will not be home that day and do not provide a key to a Catalyst representative for entry to the unit, a locksmith is authorized to drill the lock out.

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8. The Demyanenkos may not refuse entry because they do not agree with the necessity of the work or believe that they can perform the proposed work themselves. They also cannot demand to see proof of Board approval for the work being conducted as a condition of providing access. Proper written notice from the Corporation or the Corporations property management company (including Catalyst) in accordance with this Order is sufficient to require them to give access to the unit.
9. The Demyanenkos are restrained from obstructing, hindering or interfering with any individual accessing their condo unit in compliance with this Order and carrying out work that the Corporation has hired them to complete.
10. In the event that the Demyanenkos refuse to allow access to the premises in accordance with this Order after the required notice has been given, then any member of a police service, as defined in the *Police Act*, RSA 2000, c P-17 ("Law Enforcement"), is authorized to accompany and assist the individuals attending to perform the required work, and to use such reasonable force as they consider appropriate to gain access to the premises and allow the required work to be performed.
11. In the event the Corporation complies with the notice provisions of this Order and Law Enforcement intervention becomes necessary to gain access, the Corporation has leave to apply for an Order holding the Demyanenkos in civil contempt for failure to provide access.
12. If the Corporation or Catalyst unreasonably require frequent or repeated access to the unit, or if there is clear evidence of improper behaviour by the Corporation, Catalyst or others accessing the unit under their instructions, the Demyanenkos have leave to apply to the Court to request a variation of this Order as may be necessary in the circumstances.

[28] In conclusion, I grant the application by the Corporation for access to the Demyanenko's condo unit in order to carry out preventative plumbing maintenance. I set out clear terms for all future access to the Demyanenko's unit under the Bylaws. These terms also apply to the stack cleaning. The Demyanenko's application for a Restraining Order against Catalyst is dismissed. I will not grant any costs against the Demyanenkos with respect to either application, because the Corporation failed to comply with its own Bylaws regarding notice and tried twice to gain access without proper notice, which created the issues bringing the parties to court.

Heard at the City of Calgary on the 6th day of May, 2021.
Dated at the City of Red Deer, Alberta this 31st day of May, 2021.

M.D. Slawinsky
J.C.Q.B.A.

Appearances:

Kay Decker
McLeod Law LLP
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Elena Demyanenko and Sergey Demyanenko
Self-Represented Litigants

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