

SUPREME COURT OF YUKON

Citation: *Whitehorse Condominium Corporation No. 95 v
37724 Yukon Inc.*,
2022 YKSC 9

Date: 20220215
S.C. No. 15-A0105
Registry: Whitehorse

BETWEEN:

WHITEHORSE CONDOMINIUM CORPORATION NO. 95

PLAINTIFF

AND

37724 YUKON INC.

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff

James R. Tucker (by videoconference)

Appearing for the Defendant

No one appearing

This decision was delivered in the form of Oral Reasons on February 15, 2022. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The plaintiff, Whitehorse Condominium Corporation No. 95 (“CC95”), has brought an application for foreclosure and to amend the declaration and plan of a condominium development. This application is the last step in a long process which involved other interrelated proceedings.

[2] In brief, the defendant, 37724 Yukon Inc. (“37724”), was a condominium developer that built a condominium housing project in Whitehorse, commonly known as “Falcon Ridge”. The original declaration and plan set out the details for the construction

of a number of units and created CC95. After having constructed units in accordance with the declaration and plan for Falcon Ridge, 37724 commenced building a multi-family building on a section of the condominium property, which it still owned, referred to as “Bare Land Unit A”. CC95 opposed the construction of the multi-family building and began proceedings against 37724 to prevent 37724 from continuing construction of the building. Veale C.J., as he was then, granted CC95’s request and imposed a permanent injunction on 37724 from continuing to build the buildings.

[3] 37724 ended up abandoning the site, leaving the building partially built, but continues to be the owner of Bare Land Unit A. CC95 obtained an order from the Supreme Court of Yukon permitting it to perform repairs on Bare Land Unit A, account for the costs incurred in performing that work, and register a lien against Bare Land Unit A for the amount of those costs.

[4] Having removed the remains of the building and remediated the site, including by constructing a retaining wall to protect the adjoining street, CC95 is now seeking the following:

- a. a final order of foreclosure be granted with respect to the lands of Bare Land Unit A against 37724 in favour of CC95;
- b. that the declaration of CC95 be amended; and
- c. that the plan of CC95 be amended.

[5] I will begin by addressing the question of foreclosure. I will then examine the request to amend the declaration and plan together.

Foreclosure

[6] Section 14(f) of the *Condominium Act*, RSY 2002, c. 36 (the “*Act*”), gives condominium corporations the right to enforce liens in the same manner as a mortgage enforced under the *Land Titles Act*, 2015, SY 2015, c. 10.

[7] Here, CC95 has a number of liens registered against Bare Land Unit A. One lien, in the amount of \$705,126.10, is for the cost to perform the repairs to Bare Land Unit A. The additional liens are for unpaid condominium fees. Condominium fees for common expenses are paid by the unit owners of Falcon Ridge. As the owner of Bare Land Unit A, 37724 also owed condominium fees but has not paid them. The total value of the amount on the liens, including repairs and condominium fees, is \$1,339,800.96. 37724 has not paid any money in satisfaction of the lien debt.

[8] Bare Land Unit A was appraised in August 2018 as having a market value of about \$285,000.

[9] In addition to the liens registered by CC95, a promissory note in the amount of \$5,100,000 was registered against Bare Land Unit A in the name of Somerset Corporation. Somerset Corporation was provided notice of this application but has not responded.

[10] In addition, s. 14 of the *Act* gives condominium corporations, after filing notice of lien, priority over all encumbrances unless otherwise provided in the declaration. I am therefore granting the final foreclosure order as requested by CC95.

[11] The application for foreclosure is the linchpin issue here. However, it is not the only problem that needs to be addressed. CC95 wants not only to own the land, but

also to use it productively. I therefore turn to CC95's request to amend the declaration and plan.

Amendment of Declaration and Plan

[12] Under the *Act*, a declaration and plan can be amended in one of two ways. First, an amendment can be made if all the owners and encumbrance holders agree.

Alternatively, an applicant can apply to court to amend the declaration and plan. In this case, CC95 seeks to amend the declaration and plan to permit the construction of four units on Bare Land Unit A, with the rest of the land to be used as a common area.

[13] Before making the application, CC95 undertook a lengthy and involved process to inform the owners and encumbrance holders of the proposal and obtain their consents. It sent out information to all owners and encumbrance holders by mail and email, held meetings, and followed up where a response was not provided. In the end, it received the consent of 50 out of 88 owners and 80 out of 88 encumbrance holders. The rest did not respond. Because CC95 could not get unanimous consent to its proposal, it has applied to Court under s. 23 of the *Act* for an order amending the declaration and plan.

[14] Section 23 directs the Court to consider four factors when determining whether to amend a declaration or plan. These factors are:

(2) ...

- (a) the scheme and intent of the *Act*;
- (b) the rights and interests of the owners individually and as a whole;
- (c) what course of action would be most just and equitable; and

- (d) the probability of confusion and uncertainty in the affairs of the corporation or the owners if the court does not make an order ...

[15] In my opinion, the scheme and intent of the *Act*, the rights and interests of the owners, and which course of action would be most just and equitable are to be taken into account in the case at bar. I do not believe that the fourth factor plays a role on these facts.

The scheme and intent of the Act

[16] The *Act* is fundamentally a piece of consumer protection legislation, and declarations and plans are part of the way the legislation protects condominium owners. Declarations and plans provide the blueprint for the layout of the condominium project and must include the size, type, and location of structures to be included. This provides certainty to owners and potential owners about the shape their individual and communal living spaces will take. It guarantees that unexpected changes to the buildings and landscape will not be foisted upon unit owners.

[17] In this case, CC95 is seeking to build an additional four freestanding units on Bare Land Unit A. The proposed buildings are similar to the units that already exist in Falcon Ridge. In fact, the question of whether further construction should be allowed and, if so, what kind of construction, has already been discussed by the Supreme Court of Yukon.

[18] After the Court issued a permanent injunction against 37724 from building the apartment-style condo units, 37724 applied to Court with a proposal to amend the declaration and plan so it could proceed with a modified version of the apartment

building. In *Whitehorse Condominium Corp No 95 v 37724 Yukon Inc.*, 2014 YKSC 2, Veale C.J. rejected the application but stated:

[56] ... the 2005 Site Plan does offer an apparent middle ground that would allow the Condo Developer to complete the Falcon Ridge condominium without destroying the character of the development that unit owners found to be so attractive in the first place. In other words, the four-plex units that are described in the 2005 Site Plan offer a basis for compromise.

[57] In my view, it would be just and equitable for the Condo Developer to proceed to construct four-plex units that it included in the 2005 Site Plan or some combination of four-plex and single-family units. ...

[19] The court, therefore, found that building four-plex units and single-family units on Bare Land Unit A would be consistent with the original design of Falcon Ridge.

[20] Given this finding, it seems to me that permitting the building of four additional units on Bare Land Unit A would correspond with the spirit of the original declaration and plan. The proposed plan, therefore, takes into account the legislation's intent to provide certainty to unit owners about the layout of condominium complexes.

The rights and interests of the owners individually and as a whole

[21] In many conflicts between condominium corporations and owners, the individual unit owners' interests are pitted against those of the group. This is not the case here. CC95 has put in a great deal of effort to ensure that unit owners are fully apprised of the proposed plan, but no unit owner or encumbrance holder has objected to the proposed amendment. Rather, they have simply stayed silent. This indicates that there is no real opposition to the draft declaration and plan. It also suggests, in my opinion, that the interests of the group would be served through allowing the amendment.

Justice and equity

[22] In the case at bar, 37724 commenced building additional units without the required consents of all the owners. Indeed, it commenced building despite being explicitly told that CC95 did not agree to the construction. When the court prohibited 37724 from continuing to build the units, it abandoned the site. 37724 has been dissolved and its sole director is no longer involved in any way in Falcon Ridge.

[23] It was CC95 and the owners of the units that were left to clean up the mess that remained from a project they objected to. They were required to pour in hundreds of thousands of dollars in remediating the problems caused by 37724. Moreover, only a small portion of what was spent can be recouped through foreclosure. Building and selling four additional units would help to further offset the costs incurred by CC95, which will be a benefit to all the owners.

[24] It is clear to me that the principles of justice and equity favour granting the proposed amendments to the declaration time. I therefore grant the plaintiff's application.

WENCKEBACH J.