

In the Court of Appeal of Alberta

Citation: Thai v Condominium Corporation No 9610243, 2024 ABCA 326

Date: 20241015
Docket: 2301-0101AC
Registry: Calgary

Between:

Annie Yen Thai

Appellant

- and -

Condominium Corporation No 9610243

Respondent

The Court:

**The Honourable Justice Dawn Pentechuk
The Honourable Justice Bernette Ho
The Honourable Justice Anne Kirker**

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice R.W. Armstrong
Dated the 29th day of March, 2023
(Docket: 2201 02031)

Memorandum of Judgment

The Court:

[1] This appeal flows from long standing conflict between the appellant Ms Thai, a condominium unit owner, and the Board of the respondent Condominium Corporation No 9610243. The Condominium Corporation is comprised of 10 residential units in a complex located in Calgary. Ms Thai and her husband own two of the units. She filed an originating application against the Condominium Corporation outlining numerous complaints including her removal from the Board, concerns with Board governance and outstanding repairs needed to her units. Ms Thai sought wide ranging relief:

- allowing her access to the Condominium Corporation’s “books” for the years 2018-2022, including all Board minutes and resolutions;
- allowing her tenants to have access to the intercom service;
- providing her with receipts for condominium fees paid for the years 2020 and 2021;
- allowing her to sit on the Board;
- directing that maintenance service be provided to her units “without prejudice, delay or excuse”;
- dissolving the Condominium Corporation or alternatively, removal of specific Board members;
- permitting her to make a claim against the Condominium Corporation’s insurer to repair damages caused to her unit by flooding and a leaking roof;
- reimbursement of time, money and damages;
- directing that a qualified roofer be retained to find out the cause of the leaking roof and to have the roof repaired;
- directing that a quality contractor open the ceiling in her unit to investigate the mould issue and repair the ceiling; and,
- an order for punitive costs.

[2] A procedural order dated March 17, 2022, directed the matter be determined through an oral hearing based on affidavit evidence and time-limited cross examination of each party. The Board president, Mr Chu, was granted a right of audience to speak before the court on behalf of the Condominium Corporation.

[3] The oral hearing took place on February 9, 2023. In his Endorsement, the hearing judge largely dismissed Ms Thai’s claims for relief, although he did order that she receive receipts for condominium fees paid and any documents described in s 20.52 of the *Condominium Property Regulation*, Alta Reg 168/2000 upon payment of any required fees.

[4] Ms Thai now appeals, arguing that the hearing judge erred in law in failing to find “improper conduct” on the part of the Board and in failing to grant the claimed relief, and that the hearing was procedurally unfair. Ms Thai also applies to admit new evidence.

[5] As stated in *McClelland v Harrison*, 2021 ABCA 89 at para 35:

It is trite law. Appeals are not “a do-over”. They are not a platform to re-litigate and make the same arguments before three new judges, hoping the result will be different. Nor, generally, are they an opportunity to advance new grievances not raised before the chambers judge, or an opportunity to tender new information or evidence that *was* available and *could have* been placed before the chambers judge, but was not. Nor can an appellate court provide relief that was not claimed in the application before the chambers judge (except upon consent of both parties). . . .

[6] These concerns are all apparent in this appeal. For the reasons that follow, the appeal is dismissed.

No improper conduct by the Board is established on this record

[7] As the hearing judge noted, the court has authority under s 67 of the *Condominium Property Act*, RSA 2000, c C-22 [the *Act*] to address “improper conduct” on the part of a condominium corporation, condominium board, developer or owner. The *Act* defines “improper conduct” to include:

- non-compliance with the *Act*, the regulations or the bylaws by a corporation, board member or an owner: s 67(1)(a)(i);
- 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” (defined in s 67(1)(b) to include an owner): ss 67(1)(a)(ii);
- the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an “interested party”: s 67(1)(a)(iii); and,
- conduct of an owner that is oppressive or unfairly prejudicial to the corporation, a member of the board, or another owner: s 67(1)(a)(iii.1).

[8] Section 67(2) of the *Act* allows the court to issue directions and award compensation where it is satisfied that “improper conduct” has occurred. Several cases have compared s 67 to the corporate oppression provisions and have adopted those principles to this legislation. In *Ryan v Condominium Corporation No 0610078*, 2021 ABCA 96 at paras 10-11 [*Ryan*], this Court

endorsed the description of oppressive conduct in *934859 Alberta Inc v Condominium Corporation No 0312180*, 2007 ABQB 640 at paras 93-94:

Oppression or oppressive conduct has been defined and discussed in a number of the cases cited above. It has been defined to be conduct that is burdensome, harsh, wrongful or which lacks probity or fair dealing.

The term “unfairly prejudicial” has been defined to mean acts that are unjustly or inequitably detrimental.

Whether the actions of the Condominium Corporation (and the Board) amount to “improper conduct” is largely a question of fact and will not be interfered with absent palpable and overriding error: *Ryan* at para 7.

[9] After reading the affidavits and hearing the oral evidence, the hearing judge concluded the evidence was insufficient to establish “improper conduct” on the part of the Board finding that the affidavit evidence before him was “both contradictory and unsatisfying and the discrepancies were not cleared up during the oral testimony of the parties”. This conclusion is supported by the record and no reviewable error has been identified.

No procedural unfairness has been shown

[10] Ms Thai alleges that the hearing was procedurally unfair because she was restricted in her time to cross examine Mr Chu, precluded from entering “contrary evidence” during her cross examination of Mr Chu, and denied a right of reply.

[11] No procedural unfairness has been demonstrated. We note that Ms Thai was permitted to tender a third affidavit at the hearing, whereas the Condominium Corporation tendered only one, and that the hearing judge scrupulously monitored the one-hour time limit for cross examination of each party outlined in the procedural order.

[12] Ms Thai was unable to identify what “contrary evidence” she was precluded from tendering through her cross-examination of Mr Chu. At one point, Ms Thai did ask the hearing judge if she was allowed to present evidence that her tenant provided the necessary information to have the intercom access fixed. The following exchange took place:

THE COURT: Well, when you are cross-examining, you can put to the witness something that contradicts what the witness says.

MS. THAI: Oh, thank you. Intercom.

THE COURT: Is this material from one of your affidavits?

...

MS. THAI: Some is in the affidavit, some is not.

THE COURT: Okay. if you are going to show him something, you need to have copies for me and for him, okay?

MS. THAI: M-hm. Thank you.

THE COURT: Thank you.

It then appears that Ms Thai did present email and text messages to Mr Chu on this point.

[13] While generally a plaintiff or applicant is entitled to a right of reply, there is no discernable unfairness in the way the hearing concluded. We are satisfied that Ms Thai was not prejudiced in the circumstances. A reading of the transcript strongly suggests her reply submissions would have been nothing more than to disagree with the facts as testified to by Mr Chu. In concluding the proceedings, the hearing judge stated: “I understand that you disagree with him and he disagreed with you. That is why we are here. I have heard your submissions. I have heard Mr. Chu’s submissions. I am not going to make a decision today. . . .”

[14] Ms Thai fully addressed all the issues in dispute in her submissions.

New evidence application

[15] Ms Thai seeks to admit two new affidavits on appeal, the exhibits of which include a complete copy of the condominium bylaws, the report from the president for the AGM dated June 21, 2023, a reserve fund study dated February 22, 2024, photographs taken after the hearing showing mould behind the walls in the appellant’s units, as well as numerous email exchanges between the parties following the oral hearing.

[16] None of the proposed new evidence is admissible under the well-known test in *Palmer v The Queen*, [1980] 1 SCR 759, 106 DLR (3d) 212. Of note, the hearing judge asked for a complete copy of the condominium bylaws because Ms Thai’s affidavits exhibited an incomplete copy. Mr Chu provided a complete copy after a break. Ms Thai objected to having the complete bylaws entered into evidence and as a result, the hearing judge declined to do so. While most of the proposed new evidence was generated after the hearing, it does not bear on a potentially decisive issue in the hearing or advance the issues on appeal. For example, part of Ms Thai’s complaint

was that the Board had not obtained a new reserve fund study within the time period prescribed by the *Act*. The fact the Board has now obtained one makes this issue moot. Similarly, the panel was advised that roof repairs have been made. As for the complete bylaws, the appellant has not pointed to any part of the bylaws that the hearing judge did not have and that could have affected the result. The application to admit new evidence is therefore dismissed.

Costs

[17] The Condominium Corporation seeks costs of the appeal on a solicitor and client basis but has not provided details of the amount of costs they seek. Solicitor and client costs are generally garnered only in the case of demonstrated reprehensible, scandalous or outrageous conduct by a party: *Goldstick Estates (Re)*, 2019 ABCA 508 at para 24 (citing *Young v Young*, [1993] 4 SCR 3 at 134, 108 DLR (4th) 193), leave to appeal to SCC dismissed, 39063 (14 May 2020). We do not find that the very high threshold for an award of solicitor and client costs has been demonstrated in this instance.

[18] We find, however, that enhanced costs are warranted. Lawyers and self-represented litigants alike are expected to be scrupulously honest and accurate in their representations to the court. That has not been case in this matter. Rather, Ms Thai has made unfounded allegations of fraud and dishonesty against the Board and Mr Chu. Of particular concern is Ms Thai's representation to this Court that the chambers judge's order regarding production of documents created a "loophole". The chambers judge ordered that she receive any documents described in s 20.52 of the *Condominium Property Regulation* upon payment of any required fees. Ms Thai advised the panel that she wishes to obtain certain documents, but the Board will not tell her what fee she must pay and therefore there is no way of enforcing the order.

[19] During the appeal hearing, we were advised that Ms Thai had brought an unsuccessful application to hold the Condominium Corporation in contempt of the chambers judge's order based, at least in part, on the same argument advanced on appeal. We requested and reviewed a copy of the affidavit of the property manager sworn April 24, 2024. Not only does the affidavit indicate that condominium documents are available to Ms Thai through an online portal, on August 14, 2023, she was sent a Document Request Form and a detailed list of fees totalling \$210. This demonstrates that Ms Thai's representation to this Court was factually false and cannot be condoned.

[20] Noting that no memorandum of argument was filed in response to Ms Thai's new evidence application, the Condominium Corporation would normally be entitled to costs of the appeal under Schedule C Column 1 in the sum of \$3,645 plus reasonable disbursements as the originating application largely claimed declaratory relief and unsubstantiated damages. In the circumstances,

we award the Condominium Corporation enhanced costs of \$8,000 inclusive of all fees, disbursements, charges and GST.

Conclusion

[21] The appeal is dismissed.

Appeal heard on October 9, 2024

Memorandum filed at Calgary, Alberta
this 15th day of October, 2024

Pentelechuk J.A.

Ho J.A.

Kirker J.A.

Appearances:

Applicant, A.Y. Thai

D. Cumming
for the Respondent