Court of Queen's Bench of Alberta

Citation: Bank of Montreal v. Rajakaruna, 2013 ABQB 368

Date: 20130627
Docket: 1201 10351
Registry: Calgary

Between:

Bank of Montreal

Plaintiff

\- and -

Gaston Rajakaruna and Shirley Rajakaruna

Defendants

Memorandum of Decision
of
K.R. Laycock, Master in Chambers

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[1] The plaintiff commenced this foreclosure action on August 15, 2012 to enforce their mortgage on the defendants condominium, alleging that the defendants are in default of their mortgage payments. The defendants' statement of defence denies defaulting in the payments. The plaintiff applies for summary judgment which would have the effect of allowing them to proceed with a redemption order.

[2] The issue is not so much that the defendants have defaulted in their regular monthly payment obligations, but whether or not they defaulted in paying amounts due to their Condominium Corporation. The Bank alleges that it has a right under the mortgage to pay amounts claimed by the condominium management company for amounts that the defendants dispute.

Background

[3] The defendants had tenants in their condominium in 2010 when the condominium management company concluded that the tenants were making excessive noise. As a result of this the management company assessed a $700.00 fine against the property owners.

[4] As a result of the tenants conduct, the defendants sued the tenants and appeared before a Residential Tenancy Dispute Officer on November 19, 2010. At the conclusion of the hearing, the Residential Tenancy Dispute Officer determined that the defendant landlords could not collect the $700.00 noise fine from the tenants.

[5] At the hearing, a representative of the property management company participated as a witness by telephone conference. The property management company rendered an invoice to the defendants in the amount of $236.25, for the representatives participation at the hearing.

[6] By letter dated April 8, 2011 the property management company demanded payment of $1012.66 from the defendants to cover the noise fine penalty and the invoice for the testimony. The defendants refused to pay and apparently resolved to allow the property management company to sue them for the amounts claimed. The demand letter stated: “Failure to pay the above amount by April 21, 2011 will result in year 2011 (until May 31, 2011) fees being accelerated ($427.00 added to $1012.66) being $1439.66 that will be due immediately. Please note a caveat will be placed at the cost of $250.00 + GST billed back to your unit.”

[7] It appears that the defendants were paying the monthly assessments on time to the property management company and there were no mortgage payments in arrears at the time. On June 2, 2011 the plaintiff provided the management company with a bank draft for $1016.35. By letter dated June 16, 2011, the plaintiff notified the defendants of having paid the outstanding balance claimed by the property management company. The defendants were asked to contact plaintiff to make arrangements for repayment of the amounts paid on their behalf.

[8] At year end, the plaintiff forwarded an annual summary of the mortgage to the defendants which showed that the plaintiff had dispersed funds on behalf of the defendants in the amount of $1016.35.

[9] On August 3, 2012, the plaintiff’s lawyer sent a demand note to the defendants alleging mortgage arrears of $1013.38 for August 2012, plus the condominium fee arrears previously paid by the plaintiff in the amount of $1016.35, property management charges of $42.00 and legal fees of $420.00.

[10] The defendants swear that the plaintiff unilaterally decided to stop the automatic withdrawal of mortgage payments from their bank account, which created the mortgage arrears in August 2012. The defendants attended at the branch and completed a customer service request to

reinstate the automatic withdrawals. No withdrawals were taken in September 2012. By subsequent agreement, the plaintiff agreed to accept payment of the monthly mortgage amounts.

[11] The plaintiff argues that the Condominium Corporation had a right to levy the noise violation fine and collect the witness fee as an expense pursuant to the bylaws. Alternatively, the plaintiff argues that even if the Condominium Corporation was wrong to levy the noise violation fine and witness fees, the mortgage company properly exercised its rights pursuant to the mortgage in making the disputed payment.

Are the Condominium Corporation's Claims Maintainable?

1. The Witness Fee

[12] The plaintiff relies upon paragraph 44(a) of the condominium bylaws which provides that "any violation of, or default under these bylaws on the part of an owner or tenants may be corrected, remedied or cured by the Corporation and any costs or expenses incurred or expanded by the Corporation shall be charged to the owner and be added to and become part of the assessments of the owner."

[13] The plaintiff argues that the tenants' excessive noise amounted to an infraction or violation of the bylaws created by the owner or the tenant. They argue that the witness fee was a cost in correcting this violation.

[14] The defendants argue that the witness fee cannot be characterized as payable pursuant to paragraph 44 (a) of the bylaws. They argue that the Condominium Corporation has not incurred this cost or expense in "correcting, remedying or curing any infraction, violation or default by the owner". There is no evidence that the Condominium Corporation paid anything to have the witness attend by telephone to give evidence at the hearing of the Residential Tenancy Dispute Officer. There is no evidence of any agreement between the Corporation and the defendants that a fee would be charged for the representative attending to give evidence.

[15] I agree with the argument of the defendants. If the Condominium Corporation actually expended money to correct a violation or default of the owner, it may be recovered pursuant to paragraph 44(a). For example, if a unit owner conducted unauthorized renovations, it would be a violation or infraction of the bylaws and the costs of rectification would be chargeable to the unit owner. Where an employee of the Condominium Corporation or the property management company voluntarily appears to give evidence at a court proceeding, there is no apparent cost to the Condominium Corporation. At least in this case there is no evidence of a cost incurred by the Condominium Corporation in having the witness spend 10 or 15 minutes on the phone with the Residential Tenancy Dispute Officer.

[16] It is my conclusion that there is insufficient evidence that the witness fee was an amount paid by the Condominium Corporation or the property management company which could be an expense chargeable pursuant to the bylaws paragraph 44(a).

[17] The defendants had taken the position that the decision of the Residential Tenancy Dispute Officer determines the issue. However, that decision dealt with rights vis a vis the landlord and tenant and not the rights of the Condominium Corporation against the defendants. Additionally the transcript of the decision was not provided to me so I do not know the basis of the decision. Unfortunately the 2 feuding parties have never been involved in court proceedings to determine the rights of the parties.

2. The Noise Violation

[18] The plaintiff argues that the Condominium Corporation may impose monetary sanctions for misconduct occasioned by owners and tenants pursuant to the bylaws paragraph 44©). Further they argue that the Condominium Corporation has a lien on and charge against the interest of any owner for unpaid assessments or any payment due to the Condominium Corporation and that the Corporation has a right to file a caveat against the owner's unit pursuant to paragraph 49(a) of the bylaws to enforce payment of the fine.

[19] Both parties agree that the *Condominium Property Act* RSA 2000, c. C-22 authorizes the Condominium Corporation to collect contribution from unit owners to cover the expenses of the Condominium Corporation, usually referred to as assessments. The Condominium Corporation may file a caveat against the owner's unit for unpaid assessments and interest and obtain a priority ahead of prior registered mortgages. In the plaintiff's brief at paragraph 26, it is acknowledged that the Corporation may not include unpaid fines in an assessment.

[20] The parties further agree that contractual charges owed by a condominium owner to the Condominium Corporation would rank behind mortgages registered against the unit. Bylaws form a contract between the Condominium Corporation and all unit owners. The bylaws of this Condominium Corporation provide that an owner of a unit shall not use the unit or permit it to be used in any manner which may cause a nuisance to another occupant of another unit. Although nuisance is not a defined term, the plaintiff argues that this includes excessive noise.

[21] The defendants argue that excessive noise does not constitute a nuisance. Assuming that excessive noise does constitute or could constitute a nuisance, there is no evidence of the extent of the noise complaint or over what period of time the noise is alleged to have occurred. Without such evidence, I cannot conclude that the Condominium Corporation was justified in levying a fine against the homeowners.

[22] The only evidence that I have is that someone in the Condominium Corporation concluded that there was sufficient noise to justify the imposition of a fine and that the fine was levied.

[23] The defendants argue that the onus is upon the plaintiff to prove that the Condominium Corporation was entitled to impose the noise violation fine. They argue that absent such evidence I must conclude that the fine was improper and the payment by the Condominium Corporation of the fine was unjustified and cannot support the plaintiff is right to foreclose on the mortgage.

[24] I agree that there is insufficient evidence for me to conclude that the Condominium Corporation was entitled to levy a noise violation fine. Where the bank claims that a condominium expense, charge or fine is valid, it has the onus to prove it. It may be enough that the Condominium Board has assessed the fine at a properly convened meeting where notice was given to the defendants. A certified copy of Board minutes evidencing the result of the meeting might suffice.

The Mortgage Contract

[25] The plaintiff argues that even if the defendants dispute the amounts claimed by the Condominium Corporation, the mortgage contract allows the plaintiff to pay all such claims and finds, without the need to inquire as to their legitimacy.

1. Property Claim

[26] The plaintiff argues that the mortgage terms provide that the defendants will not do anything to allow the condominium unit to be subject to a property claim, including a claim for unpaid condominium fees. It referred to the following mortgage clauses:

> 1.22 **Property claim**. This is a right of anyone other than you in the property, and can include:
> .....
>
> A lien created by law (for example, for property taxes, utilities or condominium common expenses, or for a judgment).
>
> 7.7.3 **Other promises**. You promised to protect your title to the property. You promised that you haven’t done, omitted or permitted anything by which the property is or may be transferred, affected or may be subject to a property claim, except for the mortgage......
>
> 10.3.1 **Property claims**. Unless we give our written consent, you must not create or attempt to create a property claim that is prior to our security or has the same priority as our security, and you must keep the property free from such a property claim.

[27] In relation to mortgage clause 1.22, the *Condominium Property Act* allows for a Condominium Corporation to file a caveat to collect certain amounts payable by an owner, which would constitute a property claim. The owner, pursuant to clause 7.7.3, promises not to allow another party to acquire a property claim. Clause 10.3.1 forbids the owner from allowing a property claim in priority to the bank security.

[28] The defendants argue that the noise bylaw fine, if legitimate, is merely a contractual breach which would not create a priority charge and therefore clause 10.3.1 is not breached.

[29] Furthermore they argue that neither the noise fine nor the witness fees are charges that are caveatable.

[30] Paragraph 44(b) of the bylaws provides that "the Corporation may recover from an owner by an action for debt in any court of competent jurisdiction any sum of money which the Corporation is required to spend as a result of any act or omission by the owner.... which violates the bylaws....."

[31] Paragraph 49(a) of the bylaws provides that the Condominium Corporation shall "have a lien on and charge against the estate or interest of any owner for any unpaid contribution, assessment, installment or payment due to the Corporation". The Corporation is given a right to file a caveat or encumbrance against the unit title for such amount.

[32] The plaintiff argues that the Corporation has a right to file a caveat pursuant to their contractual charge in relation to the noise violation fine. This would be a charge registered subsequent to any existing mortgage registered on title.

[33] The plaintiff argues that the condominium Corporation was therefore in a position to register a caveat against the property to secure the payment of its outstanding charges.

[34] At the hearing, the plaintiff initially acknowledged that the noise fine is at best a contractual claim which would not have priority to a registered mortgage. Then the plaintiff argued that any amount due from the owner to the Corporation that remains due and unpaid for a period of 30 days allows the Corporation to accelerate amounts due by the owner for the fiscal year, including all assessment amounts, which make all such amounts immediately due and payable by the owner. In some way they see this acceleration of all non-assessment amounts to be automatically converted to assessment amounts which they argue would be claimable in priority to a registered mortgage.

[35] The defendants argue that this circular and inventive argument cannot be sustained by an ordinary reading of the bylaws and would fly in the face of the well reasoned decision of Master Prowse in ***Condominium Plan No. 8210034 v. King*** 2012 CarswellAlta 413, 2012 ABQB 127, 213 A.C.W.S. (3d) 782, [201] A.W.L.D. 3109. Master Prowse clearly delineated the difference between statutory and contractual claims and priorities that flow therefrom.

[36] As counsel for the defendants noted, to follow the plaintiff's argument would mean that the Condominium Corporation, by properly crafting its bylaws, could take a contractual claim and, notwithstanding the provisions of the *Condominium Property Act*, elevate it to a statutory claim. I disagree with plaintiff's analysis. If the Corporation had a right to levy the fine, it is a contractual claim only which would support a caveat against title as an encumbrance subject to a prior registered mortgage.

[37] If the Condominium Corporation had a right to charge witness fees under paragraph 44(a) of the bylaws, they could maintain a statutory charge in priority to a registered mortgage. However I have concluded earlier that the witness fees are not maintainable due to a lack of evidence.

[38] It is my conclusion that since the noise bylaw cannot be a priority claim, the plaintiff cannot rely upon paragraphs 1.22, 7.7.3 or 10.3.1 in the mortgage contract.

2. Common Expenses

[39] The plaintiff argues that the defendants are required to pay all amounts to the Condominium Corporation as required in the bylaws including the fine and witness fee. Paragraph 8 of the mortgage deals with special terms in relation to condominiums and paragraph 8.1 states in part:

> **The common expenses** are the share of the expenses, levies, reserves or contingency fund, assessments or other payments that condominium law or the condominium rules require you to pay to the managing body.

[40] Paragraph 8.5 of the mortgage states:

> **Common expenses.** You must pay all the common expenses when they're due. You must give us a receipt or other proof that you've paid them when we asked for it. When we pay a common expense, we can rely on a statement that appears to be issued by the managing body showing the amount of the common expense and the date it's due.

[41] The defendants argue that neither the fine nor witness fee is by definition a common expense. Other unit owners are not required to pay or share in this expense.

[42] I agree with the defendants' argument.

3. Condominium Obligation

[43] The plaintiff next refers to the mortgage paragraph 8.9 which states:

> **Condominium obligations**. You must comply with all your obligations under condominium law and the condominium rules. You must give us any proof of compliance that we request. You must not do anything that materially increases your obligation under condominium law or the condominium rules. If we ask, you must exercise your rights to have the managing body, or holders of other units, comply with their obligations under condominium law in the condominium rules.

[44] The plaintiff argues that the defendants failed to comply with their obligations under the condominium rules that prohibit the owner or a tenant from creating a nuisance.

[45] The defendants argue that this paragraph simply cannot be interpreted as broadly as the plaintiff wishes. In any event, they argue that there is insufficient evidence to support the imposition of the fine.

[46] Given that I agree with the defendants that there is insufficient evidence to support the imposition of the fine, I need not consider the plaintiff's argument that the defendant is in breach of its obligations pursuant to paragraph 8.9.

4. Default

[47] The plaintiff refers to various provisions under the default clauses of the mortgage. Paragraph 11.1 deals with when the mortgage goes into default. Events of default relied upon by the plaintiff are:

> 11.1.2 Any obligation to us under the mortgage isn't complied with.
>
> 11.1.3 Any promise made to us for the mortgage is broken or any information given to us for the mortgage isn't materially true or correct whether or not you knew it was untrue or incorrect.

[48] The plaintiff alleges that the defendants are in breach of these covenants and therefore relies on paragraph 11.11 which authorizes the mortgage company to perform the mortgagors obligations when the mortgage goes into default. They argue that because of the defendants default, they were merely performing the defendants obligation to pay the amounts claimed by the Condominium Corporation.

[49] My earlier conclusion that there is insufficient evidence to support the claim for the noise fine and the witness fees, dictates that I cannot conclude that the defendants have failed to comply with their obligations under the mortgage and the bank cannot rely on paragraph 11.1.2 in these circumstances.

[50] It is doubtful that paragraph 11.1.3 has anything to do with the facts in this case. It appears to relate to any pre-contract disclosure that was given by the defendants to the plaintiff. No such misconduct is alleged.

Conclusion

[51] The bank's application for summary judgment and redemption order is dismissed. The defendants do not apply for summary judgment dismissing the plaintiff's claim. Therefore it is necessary for the claim to proceed to trial, where the plaintiff may call evidence to better support its allegation that the Condominium Corporation was entitled to charge the noise fine and witness fees.

[52] The parties shall arrange with my clerk to arrange a time to speak to the matter of costs.

Heard on the 05th day of June, 2013.
Dated at the City of Calgary, Alberta this 27th day of June, 2013.

K.R. Laycock
M.C.C.Q.B.A.

Appearances:

Dean A. Hitesman
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for the Plaintiff

Loran V. Halyn
Sugimoto & Company
for the Defendants