COURT OF APPEAL FOR ONTARIO

CITATION: Carleton Condominium Corporation No. 396 v. Burdet, 2016 ONCA 394
DATE: 20160525
DOCKET: C59930

Rouleau, Pardu and Benotto JJ.A.

BETWEEN

Carleton Condominium Corporation No. 396

Plaintiff (Respondent)

and

Claude-Alain Burdet, Claude-Alain Burdet In Trust, 1457563 Ontario Corporation, 1457563 Ontario Corporation In Trust, Janet Sue Burdet, Nelson Street Law Offices, L'Académie Christiane Sauvé Inc., International Beauty Depot, and Entreprise Ted Rubac Enterprises Inc.

Defendants (Appellants)

Claude-Alain Burdet, for the appellants

Christopher Rootham and Nancy Houle, for the respondent

Heard: May 3, 2016

On appeal from the judgment of Justice Paul B. Kane of the Superior Court of Justice, dated December 23, 2014, with reasons reported at 2014 ONSC 7411.

ENDORSEMENT

[1] The appellants submit that the trial judge erred in concluding that they owed nearly $300,000 in condominium fees that were in arrears to Carleton Condominium Corporation No. 396 ("CCC 396") and that liens and notices of

sale relating to several of the appellants' units were valid. They advance procedural arguments, as well arguments on the merits. We would not give effect to any of the grounds of appeal and would dismiss the appeal.

A. PROCEDURAL ARGUMENTS

[2] This action to recover unpaid condominium fees from the appellants and vacant possession of various condominium units owned by them was started in 2009. At that time, CCC 396 was managed by a court-appointed administrator, Condominium Management Group ("CMG"), pursuant to an order made in another proceeding on April 2, 2002. The appellant, Claude-Alain Burdet, was a party to that other proceeding and was found in contempt of an earlier order on the same date.

[3] On this appeal, Mr. Burdet argues that the order appointing CMG as administrator of CCC 396 ought never to have been made, and that as a result, the action leading to the judgment below and to this appeal is fatally flawed, since it was pursued by the court-appointed manager.

[4] The Divisional Court dismissed an appeal from the April 2, 2002 order on December 12, 2002, and this court refused leave to appeal on March 26, 2003.

[5] The rule against collateral attack prevents the appellants from challenging orders or judgments other than the final judgment on appeal in this proceeding: *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at pp. 599-604.

[6] For the same reason, other arguments advanced on appeal that are premised on challenges to other court orders, which have not been appealed or where an appeal has already been dismissed, must also fail.

[7] In particular, the appellants indirectly challenge the validity of a partial summary judgment order granted on September 30, 2011 against them for condominium fees they acknowledged they did not pay. This court dismissed an appeal from that order on April 13, 2012.

[8] Similarly, a trial management order was made on January 11, 2012, ordering the appellants' counterclaim to be tried separately. No appeal was taken from that order and it cannot be challenged at this stage. In any event, s. 84(3)(b) of the *Condominium Act, 1998*, S.O. 1998, c. 19, provides that an owner is not exempt from the obligation to contribute to common expenses, even if "the owner is making a claim against the corporation".

[9] The appellants further challenge the trial judge's award of a remedy against the corporation, Entreprise Ted Rubac Enterprises Inc. ("ETRE").

[10] On the first day of trial, counsel for the appellants advised the court that none of the defendants owned any units in the condominium any longer. Counsel for CCC 396 performed a title search that evening, and discovered that three days before trial, all of the appellants' units except one had been transferred to ETRE. "Ted Rubac" is C.A. Burdet spelled backwards. CCC 396 requested an

order on the second day of trial adding ETRE as a defendant. The appellants consented to the addition of the party, and Mr. Burdet confirmed at trial that he would be counsel for ETRE at the trial. Although the Statement of Claim was never formally amended, the trial judge's February 18, 2015 amended reasons added ETRE as a named defendant in the style of cause, consistent with the consent of the parties.

[11] The appellants now take objection to any order having been made against ETRE.

[12] Although added as a party at trial on consent, ETRE has not appealed any aspect of the judgment against it. The appellants have no standing to challenge the orders made against ETRE, despite Mr. Burdet's apparent control of that entity, as found by the summary judgment motion judge on September 30, 2011.

B. THE CONDOMINIUM CORPORATION'S RIGHT TO SUE FOR UNPAID CONDOMINIUM FEES

[13] The appellants submit that under the *Condominium Act, 1998*, a corporation has no power to sue for unpaid common expenses, and its only recourse is to register and enforce a valid lien, which they submit CCC 396 has not done.

[14] Section 84(1) of the *Condominium Act, 1998* requires owners to contribute to the common expenses in the proportions specified in the declaration of the corporation.

[15] Section 85(1) provides an enforcement mechanism:

> If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

[16] A lien expires three months after the default that gave rise to the lien occurred, unless the corporation registers a certificate of lien within that time: s. 85(2).

[17] However, s. 136 of the *Condominium Act, 1998* provides that the Act does not exclude other remedies:

> Unless this Act specifically provides the contrary, nothing in this Act restricts the remedies otherwise available to a person for the failure of another to perform a duty imposed by this Act.

[18] A court engaged in statutory interpretation must read the words of an act in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of the enacting legislature: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

[19] Moreover, the *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, provides in s. 64(1):

> An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

[20] It cannot have been the intention behind the *Condominium Act, 1998* that if a condominium owner fails to pay common expenses and for some reason the corporation does not register a lien, the corporation is powerless to recover the arrears and the other owners must bear the consequences of the defaulting owner's non-payment. While the lien provisions offer an efficient enforcement mechanism, the Act does not specifically provide that a corporation cannot also sue to recover judgment, and s. 136 therefore leaves that option available.

[21] This interpretation is reinforced by s. 85(6), which provides that the lien may be enforced in the same manner as a mortgage. A mortgagee may sue on the promise to pay, as well as enforce the security provided by a mortgage.

[22] This interpretation is also consistent with jurisprudence from this court. For example, in *Toronto Standard Condominium Corp. No. 1908 v. Stefco Plumbing & Mechanical Constructing Inc.*, 2014 ONCA 696, 377 D.L.R. (4th) 369, a condominium corporation lost the priority of its claim for common expense arrears to mortgages registered against the units in question because of the corporation's failure to register a lien within the three-month expiry period. Despite the loss of the lien, judgment for the arrears was granted in favour of the corporation against the unit owner.

C. CHALLENGES TO THE FINDINGS OF THE TRIAL JUDGE

[23] The appellants' merits-based arguments can be summarized as follows:

- The trial judge should not have preferred the accounting evidence of CCC 396's expert witness, Marc Brazeau, over the evidence of one of the appellants' sons.
- The trial judge should not have concluded that a water consumption by-law, on the basis of which the appellants claimed annual water consumption credits, was invalid on the ground that it was contrary to the Declaration of the corporation. This water consumption by-law favoured the appellants, and was adopted at a time when they controlled the Board of Directors of CCC 396.
- The trial judge should have concluded that an increase in condominium fees over the years, as well as two special assessments levied by CCC 396 for major roof repairs and to reduce its accumulating deficit, were invalid.
- The trial judge should have found that CCC 396 could not recover some or all of the unpaid condominium fees because of repeated and systematic violations of provisions of the *Condominium Act, 1998*, such as CMG's grouping of the appellants' 18 condominium storage units into 3, rather than 18, accounts.

- The trial judge should have given the appellants credit for a payment made under protest in 2009 when he calculated pre-judgment interest. The appellants had insisted that the payment be held in trust in a solicitor's account and not released to CCC 396 pending trial. The money was released after partial summary judgment was granted in favour of CCC 396 on September 30, 2011. The appellants submit that the trial judge should have credited them with this payment as of 2009, rather than as of the date of release in 2011.
- Finally, the trial judge should not have concluded that valid liens had been registered against some of the appellants' units. According to the appellants, they did not owe any arrears of condominium fees when the liens were registered. The trial judge found that there were arrears of common expense fees when the liens were registered, and that the liens were therefore valid.

[24] All of the above conclusions were reasonably open to the trial judge on the evidence before him. The appellants have not shown that there was any error in the trial judge's reasons that would justify appellate interference.

D. LEAVE TO APPEAL COSTS

[25] In their Supplementary Notice of Appeal, the appellants sought leave to appeal from "any and all other aspects [of the judgment below], if needed,

including the forthcoming order for costs." There was no basis advanced in written or oral argument upon which leave to appeal from the ultimate costs award in favour of CCC 396 could be granted, and we would not grant leave to appeal from the costs award.

E. DISPOSITION

[26] Accordingly, the appeal is dismissed, with costs to the respondent fixed at $27,000, inclusive of HST and disbursements.

"Paul Rouleau J.A."
"G. Pardu J.A."
"M.L. Benotto J.A."