

Case Name:

**Summerville Condominium Corp. v. Dynamic Physiotherapy
Services Ltd.**

Between

Summerville Condominium Corporation, applicant, and
Dynamic Physiotherapy Services Ltd., respondent

[2003] N.J. No. 332

2003 NLSCTD 182

Docket: 2003 T St. J. No. 3780

Newfoundland and Labrador Supreme Court - Trial Division

Barry J.

Heard: December 5, 2003.

Oral Judgment: December 19, 2003.

Filed: December 22, 2003.

(36 paras.)

Condominiums -- Whether Board of Directors entitled to refuse permission to erect sign after approving sale of condominium unit, where agreement of purchase and sale contained condition that sign be erected.

Statutes cited:

The Condominium Act, R.S.N. 1990, c. C-29.

Counsel:

Geoffrey K. Penney, for the applicant.

Glen S. Belbin, for the respondent.

¶ 1 **BARRY J.** (orally):— The Application in this matter requests this Court's intervention concerning a sign erected on the Applicant's parking lot and smaller signs in the windows of the unit occupied by the Respondent. Following the removal of the window signs and an undertaking by the Respondent not to replace them, the only matters now to be considered relate to the Respondent's entitlement to erect the parking lot sign.

BACKGROUND FACTS

¶ 2 The Applicant, Summerville Condominium Corporation, manages and maintains the property and assets of the Corporation situated at 386 Elizabeth Avenue, St. John's, known as Summerville Condominiums.

¶ 3 The Respondent, Dynamic Physiotherapy Services Ltd., is the owner of unit # 119 of Summerville Condominiums from which it operates a business which provides physiotherapy and massage services.

¶ 4 Pursuant to an Agreement of Purchase and Sale dated May 19, 2002, Unit # 119 was conveyed from J.S. Murray Electrical Limited to 11116 Newfoundland Limited (Dynamic Physiotherapy Services Ltd.) by a Deed of Conveyance dated on or about June 28, 2002, and registered in the Registry of Deeds for the Province of Newfoundland and Labrador at Roll 2285, Frame 1536 on July 5, 2002.

¶ 5 The Agreement of Purchase and Sale contained a condition requested by the Respondent as follows:

QUICKLAW

"Purchaser [Respondent] to be able to install a sign over the entrance to this unit and on sign area near entrance from Paton St."

¶ 6 The real estate agent on the sale was also President of Perennial Management Limited, which has a contract with the Applicant to manage the condominium property.

¶ 7 The Applicant admits that its Board of Directors consented to the sale of Unit # 119 to the Respondent and consented to the Respondent's use of the unit as a physiotherapy and massage clinic pursuant to the Applicant's Declaration and By-laws on or about June 5, 2002. However the Applicant alleges its Board of Directors did not consent to the Respondent's installation of a sign on the common elements in the area of the Paton Street entrance to the condominiums, or to the use of the Applicant's power supply to operate that sign.

¶ 8 The Applicant asserts that its Board of Directors had not seen a copy of the Agreement of Purchase and Sale until after the meeting of the Board of Directors on June 5, 2002. The minutes of that meeting record the following:

Darlene [Rendell, Manager of Perennial Management Limited] is in receipt of a letter with a request from a Physiotherapists and Massage Therapy company to purchase Unit 119. This letter also includes a request to have a sign up over the entrance to 119 removed. Alfred Bailey made a motion to give consent to the purchase of Unit 119. Terry Martin seconded this.

Darlene will respond to this letter and also look after having the sign in question removed.

¶ 9 In fact, it was not until July 2, 2003, that the solicitor for the vendor sent a letter to Darlene Rendell, with a consent form attached, requesting written consent to the sale of Unit 119. The Board did not see any letter of request as referred to in the minutes. I have been supplied with a copy of an e-mail message, dated May 27, 2002, from Kevin King to Darlene Rendell, which apparently relates to Unit 119 although it refers to "Unit 120 Summerville (belonging to J.S. Murray)", in which it is noted that the purchasers will be operating a physiotherapist and massage therapist clinic and want to install a sign "on the main billboard on Elizabeth Avenue," after which someone, (the Applicant suggests Darlene Rendell) added at some time in handwriting and followed by the initials "DR," the words "interpreted as pylon sign" (that is, the main signage area where all owners, including the Respondent have signs). The minutes of the June 5, 2002 Directors meeting were not received by the Respondent's solicitors until July 23, 2003. The sale had closed subject to the vendor's solicitor undertaking to deliver the consent of the Board to the sale.

¶ 10 On or about May 3, 2003, the Respondent, without anything further from the Board of Directors arranged for the installation of a large sign advertising its name and business on the common elements of Summerville condominiums (that is, the parking lot), near the entrance which leads from Paton Street. Subsequently, the Respondent, again without anything further from the Board of Directors, hooked its sign up to the Applicant's exterior electrical service.

¶ 11 The Applicant says that it retained workers to remove the sign erected on the common elements near the Paton Street entrance, but representatives of the Respondent confronted these workers and prevented them from removing the sign. The workers then left the area.

¶ 12 Solicitors for the Applicant wrote to the Respondent on May 26, 2003, and again on July 24, 2003, demanding that the sign erected on the common elements at the Paton Street entrance be removed and that use of the Applicant's exterior electricity supply cease. The Respondent, through its solicitors, refused to comply with these demands.

ISSUES

¶ 13 Three issues arise:

- (1) What authority does the Board of Directors exercise in relation to the common elements of Summerville Condominium Corporation?
- (2) Has the Respondent violated the Declaration and By-Laws of Summerville Condominium Corporation?
- (3) If so, is the Applicant estopped from enforcing its Declaration and By-laws?

THE LAW AND ANALYSIS

- (1) What authority does the Board of Directors have in relation to the common elements of Summerville Condominium Corporation?

¶ 14 The elected Board of Directors, as representative of Summerville Condominium Corporation, has exclusive authority with respect to areas designated as common elements.

¶ 15 Pursuant to paragraph 4.02 of Article IV of the Declaration, common elements are specified as "all areas and spaces on the Property not specifically designated as Units". This would include undesignated parking areas and open spaces outside of the Condominium building itself.

¶ 16 The Condominium Corporation and its Board of Directors derive their authority in relation to the common elements, in part, from the Condominium Act, R.S.N. 1990, c. C-29. Section 12(4) of the Act states:

It shall be the duty of the corporation to maintain, repair and where necessary renew the common elements and for these purposes it shall have the power to

- (a) effect compliance by the owner of a unit with this Act, the regulations, the declaration and the by-laws; and
- (b) make repairs or do a matter or thing which the owner of a unit is obliged to do with respect to the common elements and to recover from the owner as a debt due by him or her all costs incurred by it in effecting the obligation of the owner.

¶ 17 The Condominium Corporation and its Board of Directors also derive their authority in relation to the common elements, from Article VII (1) of their By-Laws. These duties include the following:

- (f) to control, manage and administer the common elements for the benefit of all the owners and for the benefit of the entire condominium project, and to maintain such staff as may be required to carry out at all times promptly and efficiently its duties in such management of the property;
- (g) to repair, maintain and renew the common elements in accordance with the provisions of the Act and the Declaration;

- (j) to effect compliance by the owners of the units with the Act, the Declaration and the By-Laws

¶ 18 By purchasing its unit, the Respondent agreed to be bound by and to comply with the terms, conditions, obligations and restrictions imposed by the Declaration and By-Laws of the Applicant pursuant to subsection 15(1) of the Act.

¶ 19 For greater certainty, Article XI, sub-paragraph 11.07(1) of Summerville Condominium Corporation's Declaration states that:

All present and future Owners, tenants, and residents of Units their families, guests, invitees or licenses, shall be subject to, and shall comply with, the provisions of this Declaration, and the By-Laws. The acceptance of a deed or transfer or the entering into of a lease or the entering into occupancy of any Unit shall constitute an agreement that the provisions of this Declaration and the By-Laws as they may be amended from time to time, (including any amendment thereafter made), are accepted and ratified by such Owner, tenant or resident, and all such provisions shall be deemed and taken to be covenants running with the Unit and shall bind any person having, at any time, any interest or estate in such Unit as though such provisions were recited and stipulated in full in each and every such deed or transfer or lease or occupation agreement.

¶ 20 The Deed of Conveyance transferring unit 119 from J.S. Murray Electrical Ltd. to 11116 Newfoundland Limited states that the Respondent, as owner, would hold the Unit:

Subject to each and every provisions contained in the Condominium Act R.S.N. 1990, Chapter C-29, as amended, and in the aforesaid Declaration and Plan and By-laws of the Summerville Development Corporation.

¶ 21 It is clear, therefore, that the Respondent, like all other unit owners in Summerville Condominium Corporation, is bound by the provisions of the Act, and the Declaration and By-Laws. The Respondent would have been aware that, in becoming a member of the condominium Corporation, it was subject to the decisions of the Corporation and its Board of Directors made pursuant to the Act, the Declaration and the By-Laws.

¶ 22 I accept the Applicant's submission that the very nature of a Condominium Corporation dictates that, for the common good of all members, the entire membership must comply with certain rules and regulations. All unit owners have a common interest in the common elements, unless limited by a provision of the Declaration and By-Laws. The integrity of the condominium structure dictates that unit owners not take unapproved, unilateral actions which affect the interests of fellow unit owners. Such actions are completely at odds with the spirit of Condominium living.

- (2) Has the Respondent violated the Declaration and By-Laws of Summerville Condominium Corporation?

¶ 23 It is not in dispute that the Respondent on May 3, 2003, installed a sign advertising its business on the common elements near the Paton Street entrance and hooked up to the Corporation's exterior power supply. This would be a violation of the Declaration and By-laws if the installation and hookup was without the permission of the Board of Directors.

¶ 24 I accept the affidavit evidence of Nelson Stowe, President of the Board of Directors, that the Board had not been previously asked for permission to erect this sign and such permission has never been expressly granted. I

find that the letter from the Respondent advising of its intention to erect the sign was not received by the Corporation's property managers until May 7, 2003.

¶ 25 I conclude erection of the sign without permission would be in violation of Article XIII (g) of the Applicant's By-laws which states:

- (g) no building or structure or tent shall be erected, placed, located, kept or maintained on the property without the prior consent of the Board.

A large freestanding sign falls within the ordinary definition of "structure".

¶ 26 I agree with the Applicant that neither express or implied permission was ever granted by the Board of Directors even though erection of the sign was a condition of the Agreement of Purchase and Sale between J.S. Murray Electrical Ltd and 11116 Newfoundland Limited (Dynamic Physiotherapy Services Ltd.). The Agreement of Purchase and Sale was a contract between a vendor and a purchaser. Summerville Condominium Corporation and its Board of Directors was not a party to that Agreement. The vendor of a unit does not have the authority to grant consent in this regard. I accept the affidavit evidence of Nelson Stowe that the Board of Directors did not see a copy of the Agreement of Purchase and Sale and was not aware of its contents prior to the conclusion of the transaction on or about June 28, 2002. The evidence satisfies me the issue of the sale of unit 119 to the Respondent was not brought to the Board's attention until its meeting of June 5, 2002.

¶ 27 At the June 5, 2002 meeting of the Board of Directors the Board granted consent to J.S. Murray Electrical Limited to sell its unit to the Respondent on the basis that the Respondent would operate a physiotherapy and massage therapy clinic. Consent to the sale of a commercial unit is required by Article XII (k) of the By-Laws which states:

¶ 28 No owner of a commercial unit shall sell their unit without first obtaining the approval of the proposed purchase use by approval of two-thirds (2/3) of the Board of Directors. The Owner shall, prior to the Board's granting of consent, submit to the Board plans and specifications in sufficient detail to enable the Board to determine the nature of the proposed business. The Board shall approve the sale and give its consent unless in the opinion of two-thirds (2/3) of the Board, whose opinion shall be final, the proposed sale is contrary to permitted uses, or municipal by-laws, and/or is likely to damage and impair the value of any other unit or the Common Elements; Pursuant to this article, the owner of a commercial unit must seek the consent of the Board of Directors to sell their unit. I agree with the Applicant that this provision does not obligate the Board of Directors to inquire into the sale itself. I also agree that the consent sought here is based on the nature of the proposed business. If the nature of the proposed business or use of the unit is satisfactory to the Board, it will provide its consent. I conclude a primary purpose of this article is to allow the Board of Directors to ensure that the business of a prospective unit owner does not compete or interfere with the business of a current unit owner or otherwise impair the value of any other unit or the Common Elements.

¶ 29 In the present case a request was tabled at a meeting of Summerville Condominium Corporation's Board of Directors on June 5, 2002. The Board was advised that the prospective purchaser, the Respondent, wished to operate a physiotherapy and massage therapy clinic at unit 119. On this basis, the Board provided its consent to the sale and to the nature of the Respondent's business. I agree with the Applicant that the Board did not thereby consent to the Respondent's erection of a sign on the common elements or to the use of Summerville Condominium Corporation's electrical power supply. I accept the evidence of Nelson Stowe that this issue was not raised at this Board meeting.

¶ 30 I do not accept the Respondent's submission that consent to erect the Respondent's sign on the common elements near the Paton Street entrance was acquired from Kevin King. First of all Kevin King has denied that he provided consent in this regard. Second, Kevin King is not the Board of Directors or even a member of the Board of

Directors and has no authority to make decisions on behalf of the Board. Third, I accept Kevin King's affidavit evidence that any involvement he had with the Agreement of Purchase and Sale between J.S. Murray Electrical Limited and 11116 Newfoundland Limited was solely in the capacity of a real estate broker with Sutton Group Plus Realty. I accept that Kevin King never represented himself as anything more than that. Neither did the Applicant. A reasonable person in the position of the Respondent would have understood that Mr. King was unable to provide any consent to erect a sign on the common elements or to use the Corporation's exterior power supply.

¶ 31 I accept the evidence of Nelson Stowe that the Board of Directors never consented to the Respondent's use of the Corporation's exterior power supply to operate its sign. This issue was not placed before the Board of Directors at its meeting of June 5, 2002. Cheques received by the Board of Directors from the Respondent as payment for some of this used electrical power were not cashed but returned to the Respondent because the Board of Directors continued to object to such use. The use of Summerville Condominium Corporation's electrical power supply constitutes a wrongful taking or conversion of the property of the Applicant.

¶ 32 The Respondent relies upon Article 3.05 (g) of the Declaration of the Applicant, which in the Respondent's interpretation requires that not only must the sale be approved but also the plans themselves. Article 3.05 (g) states as follows:

3.05 (g) The Owner of each Commercial Unit shall first obtain the approval of the Board of Directors before selling his Unit. The Owner shall, prior to the Board's granting of approval, submit to the Board plans and specifications in sufficient detail to enable the Board to determine the nature of the proposed business. The Board shall approve the plans and give its consent unless in the opinion of the Board, whose opinion shall be final, the proposed sale is likely to damage or impair the value of any other Unit or the Common Elements; (Emphasis Added.)

¶ 33 The Respondent argues that the plans in the present case are the Agreement of Purchase and Sale, with all conditions found therein. The Respondent submits a purchaser is entitled to assume there is a mandatory duty imposed on the Board of Directors by Article 3.05 (g) to obtain all plans and consider them before issuing any approvals. I do not interpret this Article as imposing any obligation upon the Board to seek out plans and specifications. This task falls upon the Owner who seeks to sell, as noted in the second sentence, "the Owner shall ... submit to the Board plans and specifications." I read the Article, by the reference to "sufficient detail", as giving the Board discretion to decide when it has sufficient information "to determine the nature of the proposed business." In the present case the Board decided it had sufficient information to conclude the nature of the Respondent's business was physiotherapy and massage services. I note the difference in wording between Article XII (k) of the By-laws, which says "The Board shall approve the sale," and Article 3.05(g), which says "The Board shall approve the plans." But I have been given no good reason why I should conclude that Article 3.05(g) negates the authority of the Board to ensure compliance with Article XIII of the By-laws, which requires the Board's prior consent before structures are erected. Article 3.05(g) merely entitles the Board to demand detailed plans and specifications for any such structure before deciding whether to grant approval.

(3) Is the Applicant estopped from enforcing its Declaration and By-laws?

¶ 34 I do not agree that the Applicant should be estopped from enforcing its Declaration and By-laws. A reasonable person in the position of the Respondent, with no evidence that the Board had seen the actual terms of the Agreement of Purchase and Sale and no evidence of any authority granted Kevin King by the Applicant to grant permission, would not have understood that the permission of the Board of Directors to the purchase by the Respondent of Unit 119 for the specified use, amounted to a representation of permission for the erection of the sign.

¶ 35 As a matter of policy, I believe this Court should have compelling evidence before finding implied

permission or delegated authority to approve in situations such as the present, where this would result in weakening the ability of a condominium's Board of Directors to exercise the type of control over a condominium's operations necessary for the protection of the interests of condominium members as contemplated by the Act, Declaration and By-laws.

SUMMARY AND DISPOSITION

¶ 36 In summary:

- (1) The Board of Directors has exclusive authority to control erection of signs on the common elements of the Applicant, including the parking lot.
- (2) The Respondent violated the Declaration and By-laws of the Somerville Condominium Corporation by erecting a sign upon its parking lot without express or implied approval of the Applicant's Board of Directors.
- (3) The Applicant is not estopped from enforcing its Declaration and By-laws because it made no express or implied representations to the Respondent that the sign could be erected.
- (4) The Applicant shall have an order in the following terms:
 - (a) The Respondent shall remove the sign advertising its business which is located on the common elements near the Patos Street entrance to Somerville Condominiums and disconnect its electrical power from the Applicant's exterior electricity supply, all at the expense of the Respondent, within 30 days of the date of this Order, and the Respondent shall refrain from re-installing such a sign in the future without the prior consent and authorization of the Applicant and its Board of Directors.
 - (b) The Respondent shall pay to the Applicant the cost of all electrical power used by it in relation to the sign.
 - (c) The Respondent shall pay the Applicant the costs of this Application.
 - (d) The reasonable legal expenses incurred by the Applicant, to the extent that the legal expenses exceed the costs recovered by the Applicant, shall be expenses recoverable by the Applicant from the Respondent as a unit owner pursuant to section 12(4)(b) of the Condominium Act.

BARRY J.

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QUICKCITE

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Court: 2003 Newfoundland Supreme Court Trial Division

Reported at:

[2003] N.J. No. 332
2003 NLSCTD 182