

In the Court of Appeal of Alberta

Citation: Waymarker Management (Silver Creek) Inc. v. Tibu, 2016 ABCA 118

Date: 20160425

Docket: 1401-0266-AC

1401-0277-AC

1401-0276-AC

Registry: Calgary

Between:

Waymarker Management (Silver Creek) Inc.

Respondent

(Plaintiff/Defendant by Counterclaim)

- and -

Patrick Cyr

Respondent

(Plaintiff/Defendant by Counterclaim)

- and -

Simona Gabriela Tibu

Appellant

(Defendant/Plaintiff by Counterclaim)

The Court:

The Honourable Mr. Justice Ronald Berger

The Honourable Mr. Justice Jack Watson

The Honourable Mr. Justice Brian O’Ferrall

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice C.S. Anderson
Dated the 13th day of June, 2014
Filed on the 10th day of October, 2014
(2016 ABQB 369, Docket: 1301-08310)

Appeal from the Order by
The Honourable Madam Justice C.S. Anderson
Dated the 24th day of September, 2014
Filed on the 10th day of October, 2014
(Docket: 1301-08310)

Memorandum of Judgment

The Court:

[1] The factual underpinnings giving rise to this appeal are fairly straightforward. The appellant owns a condominium property at Silver Creek Lodge. Waymarker Management (Silver Creek) Inc. (Waymarker) is the manager of a rental pool for owners of individual units at the lodge. That relationship is subject to a contract between the condominium association and Waymarker. The respondent, Patrick Cyr, is the maintenance manager for Waymarker.

[2] The factual record reflected in the impugned judgment of the Court of Queen's Bench is that over the course of a number of encounters between the appellant and Waymarker employees, including Mr. Cyr, the perception of those employees was that the appellant was overly demanding. From the perspective of the appellant, the employees were less than cordial. In the case of Mr. Cyr he was seen by the appellant to have become frustrated with her and, indeed, as the judge in the Court below observed, Mr. Cyr acknowledged that he raised his voice at her when she would not listen to him. The judge added (Waymarker Management (Silver Creek) Inc. v. Tibu, 2014 ABQB 369, at para. 18) that Mr. Cyr "demonstrated for the Court how he raised his hands to express his frustration."

[3] At trial in the Court of Queen's Bench, which proceeded in the appellant's absence, the employees, including Mr. Cyr, denied being abusive to or aggressive with the appellant.

[4] For her part, the appellant maintains that she notified counsel for the respondents that she would be unable to attend the trial for medical reasons. That explanation, brought to the attention of the trial judge, was rejected by her for the reasons set out in the judgment appealed from.

[5] The Queen's Bench judge did have before her a number of emails from the appellant setting out the appellant's complaints which described her sense of the content of the encounters between her and Waymarker employees, including Mr. Cyr. She complained about tone of voice and construed certain behaviour as "emotionally violent" which, in turn, precipitated her demands for the dismissal of Mr. Cyr from the maintenance services of the condominium building.

[6] In the light of all of the foregoing, two restraining orders were obtained, one by the appellant against Mr. Cyr and a second by Waymarker against the appellant. The former was dismissed, the latter upheld, the trial judge reasoning:

"Finally with respect to the Restraining Order of July 15th, 2013 obtained by Waymarker, I have reviewed RP v. RV, 2012 ABQB 353 in which the Court set out the test for a no-contact restraining order: has the applicant established that the respondent poses a legitimate risk of harm to the applicant, to a person under the

applicant's care or to the applicant's property, as a result of the respondent harassing, intimidating, molesting, threatening or [engaging in] violent behaviour?

Having seen the email exchanges between the Plaintiff and Ms. Scott and others, having heard the evidence of Ms. Scott and Mr. Cyr, and having heard the basis upon which Ms. Tibu sought an ex parte restraining order, I am satisfied that Ms. Tibu's behaviour has been harassing, intimidating, and threatening toward Waymarker and its employees. I am satisfied that left unchecked, Ms. Tibu poses a legitimate risk to Waymarker and its employees and as such the Restraining Order of July 15, 2013, should be permanent."

Waymarker Management (Silver Creek) Inc. v. Tibu, 2014 ABQB 369, at paras
34-36

[7] Two grounds of appeal are proffered:

- 1) The trial judge erred in issuing a permanent restraining order against the appellant, which order was unreasonable and unjust in the circumstances;
- 2) In awarding costs against the appellant, the trial judge erred, given that the respondents were self-represented.

[8] In our opinion, there was and continues to be a reasonable basis to restrain the appellant from engaging in personal contact with employees of Waymarker, including Mr. Cyr. That said, the arrest and detention provisions are in some respects excessive and disproportionate to the factual underpinnings which gave rise to the scope of the impugned Restraining Order.

[9] As a property owner at Silver Creek, the appellant must be permitted to pursue her property rights. Given the history of her unpleasant encounters with employees of Waymarker, the balance of convenience favours a direction that limits her contact with employees of Waymarker to the written word.

[10] Accordingly, we conclude that the restraining order must remain in full force and effect subject to the deletion of the arrest and detention provisions and that the order should also be varied to include a provision that, save in the case of an emergency, the appellant shall communicate with employees of Waymarker, including Mr. Cyr, only in writing. If for any reason employees of Waymarker are required to enter the appellant's condominium, she is to be absent and notified in writing once their tasks have been completed. To that extent only, the appeal is allowed.

[11] As to the ground of appeal premised upon the costs award, we appreciate full well the appellant's argument that because Mr. Craig, who appeared as counsel at trial, is the sole director of the respondent company and a majority shareholder, he should not be entitled to costs in his own

cause. We reject that argument mindful of the broad discretion conferred upon a trial judge in awarding costs (see: Rule 10.31(5)). That ground of appeal also fails.

[12] Counsel for the respondent will prepare the formal judgment roll in accordance with these reasons which shall be subject to the approval of the Chair of the panel. The formal judgment may thereafter be filed without the approval of the appellant as to form and content.

[13] Given the limited success on appeal to this Court, we fix costs in favour of the respondent in the sum of \$500.00.

Appeal heard on April 13, 2016

Memorandum filed at Calgary, Alberta
this 25th day of April, 2016

Berger J.A.

Watson J.A.

O’Ferrall J.A.

Appearances:

L.T. Craig
for the Respondent

S. Tibu (In Person)
for the Appellant