Unofficial English Translation

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF QUÉBEC

No.: 200-17-004939-047

DATE: February 23, 2006

PRESIDED BY: THE HONORABLE FRANK G. BARAKETT, J.S.C.

DOMAINE FRANÇOIS DE LAVAL IV, a duly registered syndicate of co-ownership, with its main office at 2753 chemin Ste-Foy, Sainte-Foy, district of Québec, G1V 4S3,
petitioner;
v.
SUZANNE MORISSETTE, residing and domiciled at 2753 chemin Ste-Foy, Apt. # 407, Sainte-Foy, district of Québec, G1V 4S3
-and-
ANDRÉ DION, residing and domiciled at 2753 chemin Ste-Foy, Apt. # 407, Sainte-Foy, district of Québec, G1V 4S3
respondents.

JUDGMENT
On a motion for a permanent injunction

Issue

[1] Can a person who has become disabled change the use of property held in divided co-ownership?

The Facts and the Evidence

[2] The petitioner is the syndicate of co-ownership of the building and is responsible for ensuring respect for the destination of the building and for executing the provisions in the declaration of co-ownership, the by-laws, the decisions of the assembly of co-owners, and the **act constituting the co-ownership** (exhibit P-1). This is not contested by the respondents.

[3] The respondents have been the owners of unit #205 of the said building since on or about May 9, 2002.

[4] It is not contested that, on or about February 12, 2004, the respondents began renovations on the private portion of unit #205 unit to install a hardwood floor.

[5] On that date, the board of directors of the petitioner sent a letter to the respondents asking them to stop the renovations they had begun in unit #205. They cited two grounds: they had not been authorized by the board of directors, and the renovations were not consistent with the building's by-laws. Sections 10.1.14 and 10.1.11 read as follows:

> [TRANSLATION]
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> Sect. 10.1.14
>
> In the exclusive portions, the entire floor must be covered with undercarpeting and carpeting, except for the bathroom, which may be covered with ceramic or another overlay, and the kitchen floor and the storage unit, which must be covered with an underlay and linoleum or another overlay, excluding wood and ceramic.
>
> Sect. 10.1.11
>
> Before making any change or repair to their exclusive portion, co-owners must submit their plans to the directors of the condominium in order to obtain approval; the directors of the condominium shall approve these plans unless the changes and repairs proposed or their implementation may cause harm to an exclusive portion or the communal portions or affect their value; once approved by the directors, these changes, modifications, or repairs shall be executed in accordance with provincial and municipal regulations and the regulations and conditions that may be imposed by the directors.

[6] Pursuant to the letter dated February 12, the respondents agreed to stop the renovations on February 13, 2004. They then sought the approval of the board of directors.

[7] The petitioner and the respondents exchanged correspondence, and there was even an attempt to amend the building's by-laws to permit the installation of a hardwood floor.

[8] Experts were consulted to obtain the result of the tests that had been carried out in February 2001 in other units in the same complex to determine the acoustic problems related to hardwood floors.

[9] A special meeting was even held to decide on the request to amend the building's by-laws to allow hardwood floors to be installed in all the condominium units.

[10] During this meeting, which took place on March 29, 2004, various proposals were made and voted on by secret ballot. All the proposals to amend the by-law or by-laws were rejected by a majority of the co-owners, as appears in the minutes (exhibit P-8)

[11] In the meantime, the respondents resumed renovations on May 18, 2004. They replaced the carpet and undercarpeting in the living room and the dining room with another overlay, made from cork. They did not do the same in the bedrooms.

[12] On May 21, 2004, the directors sent a second notice to the respondents instructing them to comply with the by-laws.

[13] Another general assembly was held on June 7, 2004. This was the annual general assembly of co-owners.

[14] It was decided at that meeting that legal action would be taken against the respondents to compel them to comply with the condominium by-laws.

[15] A final notice was sent to the respondents on June 19, 2004.

[16] The defence argues that the by-laws are discriminatory because sections 10.1.11 and 10.1.14 of the declaration of co-ownership are unconscionable in light of the fundamental rights of the respondents and of Mr. André Dion in particular, given his health.

[17] The respondent claims that, approximately five or six months after acquiring his unit, his health problems worsened rapidly and he had to have his right leg amputated. As a result, he now moves about in a wheelchair. This was not contested.

[18] He argues that it is more difficult to move about in a wheelchair on a floor covered with carpeting than on a hardwood floor.

[19] He claims that other illnesses caused more vomiting, and that the carpeting was unsanitary and more difficult to clean than a hardwood floor.

[20] More specifically, in paragraph 39 of the defence, he claims:

> [TRANSLATION]
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> As will be demonstrated at the hearing, the changes made to the overlay were essential and even recommended by the respondent's various doctors.

[21] Furthermore, the respondents added that they were attempting to soundproof their unit.

The Evidence

[22] Sections 10.1.11 and 10.1.14 of the declaration of co-ownership were essentially intended to reduce noise in the building after it was built.

[23] These by-laws deal directly with the quality of soundproofing in each of the units, guaranteeing minimum noise pollution.

[24] An expert report on the respondents' specific unit was conducted during a recess from the trial, and it found that none of the minimum standards were met.

[25] The respondents never had an expert appraisal done before they installed their cork flooring, which has none of the soundproofing qualities of carpeting and undercarpeting.

[26] The evidence demonstrates that the building was not intended to be used by the elderly, and even less as a condominium for persons with limited autonomy.

[27] The respondent testifies that he bought his unit from a person who had to move specifically because she was in a wheelchair and was looking for a building that did not have carpeting as a requirement.

[28] The respondent explains that he had left a single-family dwelling because he was no longer healthy enough to live there and he preferred to live in a multi-tenant building that required much less upkeep.

[29] There was no evidence of a medical opinion in the records to support the claims in paragraph 39 of the defence, with the exception of some letters signed by doctors saying that it was more hygienic not to have carpeting.

[30] One of the letters was not signed by the respondent's attending physician, as admitted.

[31] The petitioner must ensure that the co-owners are able to properly enjoy their exclusive portions in consideration of the soundproofing set out in the act of co-ownership, contrary to what the defence argues in paragraph 45.

[32] The petitioner did not act in bad faith, having agreed and suggested that the respondents should try to have the by-laws amended by the general assembly.

[33] There is no expert medical evidence in support of the respondent's position that would enable a legal consideration of whether either of the charters would allow changing the use of a building to make it a residence for persons with limited autonomy.

[34] In order to come within the scope of section 10 of the *Charter of human rights and freedoms*, there must at least be medical evidence submitted demonstrating that the respondent is too medically disabled to live in a building that is not used as a residence for autonomous persons with limited autonomy, or even to live in a residence that does not allow flooring other than carpeting and undercarpeting. The complete absence of such expert evidence means that this aspect of the defence may not even be considered.

[35] This section reads as follows:

> **10.** Every person has a right to full and equal recognition and exercise of his human rights and freedoms without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.
>
> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.[1]

[36] However, this right does not permit the board of directors to authorize anything other than what is set out in the by-laws. The board of directors has no discretion in that area.

[37] The respondents have cited case law in which the condominium by-laws granted the board of directors discretion with respect to whether the person may install anything other than carpeting or undercarpeting.

[38] The by-laws and the use of the building, as submitted in the evidence, grant no such discretion to the board of directors. Therefore, the case law cited in support of the defence does not apply in this case.

[39] The prejudice is serious, since it permanently reduces the quality of soundproofing and directly affects three neighbours, namely, the one below and the two on the same floor.

[40] The expert report demonstrates that the two neighbours on the same floor are affected to the same extent as the one below.

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[1] *Charter of human rights and freedoms*, R.S.Q., c. C-12.

[41] Therefore, the damage from lack of soundproofing is irreparable and permanent, because there is no way to reduce the noise in the absence of carpeting and undercarpeting, except by granting this injunction.

[42] The permanent injunction should therefore be granted.

FOR THESE REASONS, THE COURT:

[43] **GRANTS** this motion;

[44] **ISSUES** a permanent injunction ordering and instructing the respondents to:

> **REMOVE** the current overlay from the living room and the dining room of unit #205 and **INSTALL** the flooring in accordance with the materials authorized by the declaration of co-ownership (exhibit P-1), including the undercarpeting and carpeting, within one hundred and twenty (120) days of the date of this judgment;

[45] **ALLOWS** the petitioners' board of directors access to unit #205, upon twenty-four (24) hours notice, to verify whether the respondents have complied with the order;

[46] **IN THE EVENT** that the respondents fail to have the current overlay removed and the appropriate flooring installed in accordance with the materials authorized by the declaration of co-ownership (exhibit P-12), **AUTHORIZES** the petitioner to remove the current overlay of unit #205 belonging to the respondents and install flooring in accordance with the materials authorized by the declaration of co-ownership (exhibit P-1), including the undercarpeting and carpeting, at the entire expense of the respondents;

[47] **ORDERS** each party to assume its own costs and to pay 50% of the cost of the expert report.

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FRANK G. BARAKETT, J.S.C.

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Counsel for the respondents

Date of the hearing: January 10, 2006