COUR SUPÉRIEURE (Superior Court)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-17-037281-071

DATE : Le 12 décembre 2007

SOUS LA PRÉSIDENCE DE : L'HONORABLE BRIAN RIORDAN, J.C.S.

EMMAR CONSTRUCTION INC.
Demandeur
c.

SYNDICAT LA CENTRALE
Défendeur

et

5831 CÔTE-DES-NEIGES INC.
Mise en cause

(Decision on the bench)

Declaratory judgment

---

[1] Question is to determine if the imperative character of article 1064 of the civil Code void the effect of article 21.2 of the declaration to the effect that the owner of a single commercial unit (Business) in an otherwise residential destination is not obliged to pay its share of common expenses of all costs related to the residential "that are not used and cannot be used" by the business. Let's note that this concerns exclusively operation costs and not the contingency fund.

> *1064: EACH CO-OWNER CONTRIBUTES IN PROPORTION TO THE RELATIVE VALUE OF HIS FRACTION TO THE EXPENSES ARISING FROM THE CO-OWNERSHIP AND FROM THE OPERATION OF THE IMMOVABLE AND THE CONTINGENCY FUND ESTABLISHED UNDER ARTICLE 1071 (OF THE CIVIL CODE), ALTHOUGH ONLY THE CO-OWNERS WHO USE COMMON PORTIONS FOR RESTRICTED USE CONTRIBUTE TO THE COSTS RESULTING FROM THOSE PORTIONS.*

[2] Syndicate of co-ownership pretends that article 21 :2 contravene article 1064 (of the code) because it allows a co-owner to contribute in a lesser proportion than the relative value of its fraction. Emmar argues that article 21:2 (of declaration) does not contravene the law because the costs (Emmar) does not pay are not those covered by 1064. More, (Emmar) would like the court to declare that common portions for which it does not want to pay are, in fact, common portions of restricted use being excluded from legal prohibition based on the exception of second part of article 1064.

[3] These arguments do not convince the tribunal. However, (Emmar) argues that all residential co-owners did renounce to the effects of article 1064 when they bought their own (fraction). This argument merits to be analyzed.

[4] We agree to the fact that article 1064 is of public order. (Emmar) says it is of public order of protection allowing parties to renounce to its effect on a part of the contract concluded between parties. Syndicate pretends it is of public order of direction, therefore excluding any agreement to the contrary under absolute nullity.

[5] In the *Gareau* v*. Le Syndicat de la copropriété 415 St-Gabriel*[1], our colleague Crépeau J.C.S. ruled that article 1041 and 1053 were of public order of protection. Court believes that the same status should be given to article 1064 especially where there is no proof of abuse or false representation within the writing of this clause or the communication of its sense to all co-owners when they bought their fractions.

[6] The source of imperative qualification given to article 1064 comes from the will of the legislator to avoid abuses from promoters as were the facts under article 441K of the old code. Here, nothing makes us presume that developer (promoter) tried to abuse the situation in any way possible.

[7] Proof reveals that this immovable was conceived to isolate, as far as possible, residences from the commercial local. Impossible to pass from commerce to residence and vice-versa. There are distinct entrances for each and the commerce does not have the key for the main door of residence side. It cannot access garage. The electrical room of commerce is within its own private portion and it has a distinct heating and air conditioning from residences.

[8] It seems clear that mix destination of the immovable was a key factor in the choice of terms of article 21 :2 (of the declaration) and any purchaser of a residential fraction could not otherwise know about efforts made to isolate both residential and commerce sides.

[9] The syndicate's opposition is based on a high-pitched formalism. It pretends that Emmar could have written the declaration in a way to reach the goal it seeks in using the concept of "portions of restricted use" but argues that the formulation of article 21:2

does not meet the criteria of such a description.

[10] Court agrees with this position but still rejects the syndicate's objection. While signing the declaration each co-owner did renounce to the prescription of article 1064 of the civil code.

[11] Article 1065 of the code sustains this conclusion. It is the opinion of the court that the restriction to the right of residential co-owners to pay common expenses based on their shares is justified by the mixed destination of the immovable, mostly based on the physical characteristics of the construction as mention above.

[12] Finally, the argument that article 21:2 could not apply because the amount of expenses would be divided between less than 100% of shares is not convincing. The text does not exclude an interpretation allowing such spread of costs.

FOR THESE REASONS, COURT :

[13] ACCEPT in part the declaratory judgment of the applicant;

[14] DECLARE that the second paragraph of article 21 of declaration of co-ownership is valid (Exhibit P-1).

[15] WITH COSTS.

BRIAN RIORDAN, J.C.S.

Me Howard Tatner
Procureur de la demanderesse

Me Yves Papineau
Procureur du défendeur

Date d'audience : Le 12 décembre 2007