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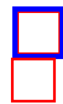

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Owners: Condominium Plan No. 922 1425 v. Miller, 2007 ABQB 324 (CanLII)

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Date: 2007-05-22

Docket: 0503 04208

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Noteup

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Decisions cited

- Brese v. Edmonton (City), 2006 ABCA 27 (CanLII)
- Dagenais v. Wilson, 1999 ABQB 922 (CanLII)

Court of Queen's Bench of Alberta

Citation: Owners: Condominium Plan No. 922 1425 v. Miller, 2007 ABQB 324

Date: 20070522
Docket: 0503 04208

Registry: Edmonton

Between:

The Owners: Condominium Plan No. 922 1425
(The Summit on Terwilligar Hill Condominium Corporation)

Applicant

- and -

Ernie Miller and Diane Marie Miller

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice Eric F. Macklin

I. Introduction

[1] On March 29, 2005, Master Breitkreuz granted an Order in favour of the Applicant requiring the Respondents to make certain modifications to a deck they had constructed contrary to an agreement they had with the Applicant and to the Applicant's bylaws. The Applicant was also awarded costs on a solicitor and own client indemnity basis. The Order was never appealed.

[2] The matter was brought back before Master Breitkreuz on a direction from the Taxation Officer for a determination of the level of costs to be paid by the Respondents to the Applicant. In Reasons issued on January 19, 2007, Master Breitkreuz concluded that the Applicant had acted in a "high-handed and heavy-handed" manner and the Respondents should receive their costs to that point in time in an amount equal to the costs awarded to the Applicant to March 29, 2005.

[3] The Applicant appeals the decision of the Master.

II. Background Facts

[4] In May 2001, the Respondents became the registered owners of Unit #32 in the condominium complex managed by the Applicant Condominium Corporation.

[5] In July 2003, the Respondents obtained permission from the Applicant to make improvements to a deck which was attached to their condominium unit. The permission was granted in the form of a Request and Indemnity Agreement ("RIA").

[6] Improvements to the deck were completed by the Respondents, but they were not fully in accordance with the RIA.

[7] The Respondents submitted a request to the Applicant for permission to modify the deck in accordance with the actual improvements they had undertaken, but the Applicant refused to grant a new RIA approving the modifications completed by the Respondents. The Respondents took no other steps to gain approval for their deck to remain as built, such as circulating a petition and obtaining signatures of the owners of other units in the condominium complex.

[8] In early 2005, the Applicant issued an originating notice of motion returnable before the Master on March 29, 2005, seeking, *inter alia*, an order:

> 1. Directing the Respondents to restore their deck to its original condition or, alternatively, to alter it so as to conform to the RIA;
>
> 2. Authorizing the Applicant to restore the deck if not done by the Respondents by May 31, 2005;
>
> . . .
>
> 4. Directing the Respondents to pay costs of the application on a solicitor and his own client indemnity basis;
>
> 5. Directing the Respondents to pay for all costs incurred by the Applicant with respect to this matter.

[9] The originating notice of motion and supporting affidavit were served on the Respondents shortly before they went on a vacation. The Respondents misconstrued the date set for the application, but did realize on the morning of the application that they were obligated to be in Court that day. They contacted their solicitor and requested that he attend immediately. He did so, but it was too late. Master Breitkreuz had already granted an Order in favour of the Applicant, which provided, *inter alia*:

> 2. That the Respondents shall bring the deck into conformity with the RIA or its original condition by May 31, 2005;
>
> 3. If the Respondents fail to do so, the Applicant may restore the deck to its original configuration at the expense of the Respondents;
>
> . . .
>
> 6. The Applicant shall have costs of the application payable by the Respondents, such costs to include:
>
> > (a) costs of any supplies, material and labour necessary to alter or restore the deck;
> >
> > (b) cost of the removal and disposal of any materials; and
> >
> > (c) legal costs on a solicitor and his own client indemnity basis.

[10] On the day of the application, but after the Order had been granted by Master Breitkreuz, the lawyer for the Respondents contacted the lawyer for the Applicant indicating that the Respondents wished to resolve the matter amicably and without incurring great legal costs. The Order was not appealed, however.

[11] The Respondents indicated a desire to reconstruct the deck to conform with the RIA originally granted in 2003. The Board of the Applicant Condominium Corporation advised that the Respondents only had to make certain modifications (such as the removal of a glass partition and metal posts) that were obviously in contravention of the RIA and that did not match the neighbouring decks. The Respondents supposedly purchased materials to modify the deck in accordance with this “new” agreement of the Board. The materials they purchased and had on site, however, did not conform to either the “new” agreement of the Board or the RIA.

[12] Members of the Board expressed concern to the Respondents that they did not appear to be abiding by the revised plan and, further, it was taking them an inordinate amount of time to comply with the requirement to modify the deck. Ultimately, the Board gave the Respondents a deadline of July 10, 2005 or thereabouts to complete the work necessary, failing which the Board would hire a contractor on July 12, 2005 to modify the deck so as to comply with the RIA. The work was not done by the Respondents. Accordingly, the Applicant hired a contractor to demolish the non-complying deck and to construct a new deck in accordance with the RIA. The demolition costs totalled $2,050 and the reconstruction costs $2,500. The Respondents paid the reconstruction costs. They also paid the solicitor and client costs demanded by the Applicant, subject to taxation, in the total sum of $5,394.37, which included fees totalling $4,662.50, disbursements of $392.05, and G.S.T. of $339.82.

[13] The taxation of the legal account was to proceed on June 5, 2006, but the Taxation Officer declined

jurisdiction. The Applicant, therefore, brought an application before Master Breitkreuz, seeking an order:

> 1. Directing the Respondents to pay the costs of $2,050 for the restoration work within 30 days;
>
> 2. Directing the Respondents to pay legal costs in the sum of $5,943.78 which were incurred by the Applicant subsequent to the Order of March 29, 2005;
>
> 3. Directing the Respondents to pay further legal costs subsequent to June 23, 2006 for the application.

[14] The application was heard by Master Breitkreuz on July 18, 2006. On January 19, 2007, Master Breitkreuz issued a Memorandum of Decision, in part stating that:

> There is a strong theme of high-handed and heavy-handed conduct on the part of at least one member of the Condominium Board that led to this minor matter reaching a point where legal costs have been incurred and construction costs have been incurred that were quite clearly completely unnecessary.

[15] The Master determined that the contractor hired by the Applicant had done the work the Applicant had not allowed the Respondents to do, and he concluded:

> . . . that in all the circumstances what is appropriate in the situation is to give the respondents costs in the precise amount as the applicants have recovered from the respondents to this point. This will leave the respondents in the position where the only costs they will incur in respect to this entire matter is the costs of supplying the material and the labour necessary to replace or renovate the deck in question.

[16] The Applicant appeals the decision of the Master on the ground that: "Notwithstanding that no appeal of the March 29, 2005 Order had ever been made, the Master reversed himself on all costs issues and awarded costs against the Applicant to the Respondents."

III. Discussion

[17] There is no way this minor matter should have escalated to the point that it did. The Respondents should have complied with the original RIA and should not have attempted to build a deck that clearly they were not entitled to build under the terms of the RIA.

[18] The Respondents did breach the bylaws of the Condominium Corporation by building a deck that did not conform to the RIA granted by the Applicant. The Applicant had the authority to take steps on behalf of the owners of units in the Condominium Corporation to ensure compliance by the Respondents with the bylaws. The bylaws allowed the Applicant to recover from the Respondents "any sum of money,

including its costs on a solicitor and client indemnity basis which the Corporation is required to expend as a result of any act . . . by an Owner . . .” (Clause 27).

[19] The application before Master Breitkreuz on July 18, 2006 was for payment by the Respondents of $2,050, said to be for “restoration work,” although the Applicant confirmed that this sum actually represented the demolition costs for the deck. The Applicant also asked for its legal costs subsequent to the Order of March 29, 2005, plus any further legal costs incurred after June 23, 2006.

[20] Contrary to the submissions of the Applicant, the January 19, 2007 Memorandum of Decision of Master Breitkreuz does not reverse his Order of March 29, 2005 with respect to costs. The Order of March 29, 2005 awarded costs to the Respondent to that point in time. In his Memorandum of Decision, the Master awarded costs to the Respondents from the date of the first Order to January 19, 2007 in an amount equal to the costs the Applicant had recovered from the Respondents under the earlier Order. Master Breitkreuz implicitly denied the Applicant the other relief it sought, including legal costs subsequent to March 29, 2005.

[21] The Order of March 29, 2005 was never appealed. Pursuant to that Order, the Respondents were obligated to modify their deck so as to conform to the RIA or to restore it to its original condition by May 31, 2005. They failed to do so, thereby entitling the Applicant under paragraph 6 of the Order to arrange to do so at the expense of the Respondents. Demolition costs of $2,050 and restoration costs of $2,500 were incurred by the Applicant. The Respondents paid the restoration costs, but the demolition costs remain outstanding. Master Breitkreuz did not allow those costs, although it is not clear why. The Applicant had an invoice for the demolition work and there was no evidence to suggest that the amount paid was excessive. Accordingly, I allow the appeal in terms of that aspect of the Master’s decision and grant the Applicant the costs of the demolition.

[22] The March 29, 2005 Order also allowed the Applicant legal costs on a solicitor and his own client indemnity basis. The Applicant submitted an account for the legal costs it incurred, which totalled $5,394.37. The Order specifically said that the Applicant was entitled to “the costs of and incidental to this Application.” Accordingly, the legal costs claimed under that Order must relate specifically to the application and the preparation and service of any Orders arising from it. With that clarification, I direct that the taxation of those costs again be referred to the Taxation Officer.

[23] There was no application before Master Breitkreuz on July 18, 2006 for costs to be paid by the Applicant to the Respondents. His Memorandum of Decision does not outline the circumstances which he felt warranted costs being awarded to the Respondents in the same amount as the costs they had paid under the previous Order. The material now before the Court does not support an Order which would amount to an award of solicitor and client costs in favour of the Respondents. Therefore, the appeal from that aspect of the Master’s Decision is allowed.

[24] While the Taxation Officer directed that the taxation be referred directly to the Master, the Applicant used the opportunity to ask for additional relief, including legal costs subsequent to March 29, 2005 (although presumably after June 23, 2005, the date of the actual account) up to June 23, 2006, and whatever further costs might be incurred after that date. The costs incurred after the Order of March 29,

2005 and up to June 23, 2006 amounted to $5,943.78. The Applicant did not specify the precise amount that has been incurred to the present time, but did suggest that the total costs (that is, from the beginning of the dispute) are now in the neighbourhood of $18,000. I find that incredible. This was a $2,500 dispute.

[25] The provision in the Condominium Corporation's bylaws allowing it to recover from an owner "its costs on a solicitor and client indemnity basis" is subject to the implicit condition that it act reasonably. In ***Brese v. Edmonton (City)***, 2006 ABCA 27 (CanLII), 2006 ABCA 27, Berger J.A., who delivered the judgment of the Court of Appeal, commented on solicitor and client indemnity costs in expropriation cases, indicating that such costs must be reasonable and that the principles to be applied in determining whether the costs are reasonable are the same as those which apply in assessing the reasonableness of solicitor costs under Rules 613 and 635 of the *Rules of Court*. At para. 4, he clarified that:

> Reasonable costs are those costs necessary for the proper presentation of the case which a solicitor could tax against a resisting client: ***Harwood v. Harwood***, [1998] A.J. No. 217. The bill of costs must only include services necessary for the proper presentation of the case, i.e. services falling within the four corners of the litigation: ***Guarantee Co. of North America v. Beasse*** (1993), 139 A.R. 241. The taxing authority will take into account the result or degree of success achieved: ***Dagenais v. Wilson***, 1999 ABQB 922 (CanLII), [1999] A.J. No. 1414, 1999 ABQB 922 and ***Nissen v. City of Calgary***, *supra*. It follows that the taxing authority will consider the relationship between the fee and the amount in issue and the amount of recovery (the principle of proportionality).

[26] The Applicant in the present case proceeded with costly steps such as preparing and filing extensive affidavits and bringing court applications without regard to the amount in issue and with the belief that all legal costs would be recovered from the Applicant. Its belief in that regard was erroneous. It should have borne the principle of proportionality in mind.

[27] In this case, once the Respondents' deck was modified in July 2005, the parties' dispute was over nothing more than costs. In essence, the Applicant is now seeking costs for seeking costs. That is not why the indemnity clause exists in the bylaws. The Applicant was entitled to pursue its claim for the demolition costs and was entitled to attend at taxation to defend the solicitor and client costs it claimed under the March 29, 2005 Order. However, I would not award either party costs of the July 18, 2006 application before Master Breitkreuz or this appeal as there has been mixed success as a result of the appeal.

IV. Conclusion

[28] The Applicant's appeal is allowed in part. The Respondents are ordered to pay the Applicant the $2,050 demolition costs, plus interest under the *Judgment Interest Act*. The Applicant's original legal account of June 23, 2005 is to be taxed in accordance with the directions given above. The Respondents are not entitled to the costs granted by Master Breitkreuz in his January 19, 2007 Memorandum of Decision. No costs of the July 18, 2006 application or the present appeal are awarded.

Heard on the 9th day of May, 2007.
Dated at Edmonton, Alberta this 22nd day of May, 2007.

Eric F. Macklin
J.C.Q.B.A.

Appearances:

Beverley S. Anderson
Melnyk & Company
for the Applicants

Eugene J. Erler
Durocher Simpson Koehli & Erler
for the Respondents

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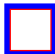
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