Court of Queen's Bench of Alberta

Citation: Owners Condominium Plan 7722911 v. Marnel, 2008 ABQB 195

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Date: 20080325
Docket: 070316423
Registry: Edmonton

Between:

The Owners: Condominium Plan 7722911

Applicant

- and -

Ronae Marnel

Respondent

Memorandum of Decision
of the
Honourable Madam Justice D.L. Shelley

Nature of the Application

[1] This is an application brought by a Condominium Corporation against an owner that it contends has violated and continues to violate the *Condominium Property Act* of Alberta (the "*Act*") and the bylaws of the condominium (the "Bylaws").

[2] Among other remedies, the Applicant is seeking: a declaration that the Respondent has breached the Bylaws; an order declaring that the Respondent cease her improper conduct and comply with the Bylaws; an order authorizing the Applicant to enter the Respondent's unit and cause compliance with the Bylaws; and an order requiring the Respondent to pay costs.

[3] The Respondent contests the application.

Background

[4] The Respondent is the owner of a unit in an Edmonton high rise residential condominium. The Applicant is operated by a Board of Directors (the "Board") which is elected pursuant to the *Act* and the Bylaws.

[5] The east side of the condominium building is subject to excessive heat generated by sunlight. On June 25, 2007, the Respondent contacted the Board by letter, suggesting that the Board consider coating the windows of the condominium with a film as a solution to this problem. The Respondent had already contacted various companies, and informed the Board that the film was available in several colours and shades. She requested that she be authorized to install a clear film to the affected windows of her unit.

[6] On June 26, 2007, the Board responded to the Respondent's letter. The Board advised that it had considered the questions of uniformity of appearance, colour and shade of film, and costs of application. After this review, the Board had decided to authorize the installation of the clear film on the east windows of the Respondent's unit, at her expense. The Board concluded the letter by indicating that it would like to follow up with her to determine the extent of the improvement of the heat problem as a result of the application of the approved film, as this would assist the Board in considering whether it should pursue this possibility in relation to other suites.

[7] On July 2, 2007, the Respondent again wrote to the Board. The Respondent acknowledged that the Board had given permission for the clear film to be applied to the windows. The Respondent then stated that the "Solar Bronze" tint would be more appropriate as "the heat generated by the sun would be cut by a much greater degree" by such tinted film. The Respondent requested that the Board approve application of the Solar Bronze film, which is slightly darker and bronze-coloured. She also advised that the film could be removed.

[8] On July 5, 2007, the Board responded by letter, clearly stating that it was not prepared to authorize the application of the Solar Bronze film to the Respondent's windows. The Board requested that the Respondent comply with the approved application of clear film and explained that the Applicant has a history of maintaining the architectural integrity and consistency of the external view of the building. As Solar Bronze film would result in bronze-tinted windows, the Board felt that its application would compromise the integrity and consistency of the building appearance. The Board maintained that, based on the information provided, the clear film would alleviate the heat problem without compromising the external consistency of appearance. It also provided other suggestions that the Respondent could pursue, such as air conditioning and a particular type of window shades. The letter concluded as follows: "The Board is not prepared to authorize a modification which compromises the external visual integrity of the building."

[9] The Respondent delivered a letter of reply on July 30, 2007. She explained that, while her windows were now covered with the Solar Bronze film, she did not intentionally disregard

the Board's decision. The Respondent stated she had been contacted on June 29, 2007, and was told by the installation company that they could install the film on that day. While the Respondent acknowledged that she did not have permission to install the Solar Bronze film, she had allowed the installation because the company informed her that the film could be removed if necessary. After a conversation with a representative of the Board, the Respondent was aware that the Solar Bronze film was not approved and she had contacted the company to arrange for its removal and replacement with the clear version. At the time of the writing of the letter, the removal had not been arranged but the Respondent intended to remove the unauthorized film. The Respondent stated that the reason for the rapid installation of the Solar Bronze film was to alleviate the discomfort caused by the extreme heat during the summer of 2007.

[10] On August 2, 2007, the solicitors for the Applicant contacted the Respondent and requested that the Respondent comply with Condominium Bylaw 48, which states that an owner cannot alter the exterior appearance of a unit. The letter stated that the Respondent's unauthorized tinted film must be removed within one week of the date of the letter, at the Respondent's expense.

[11] On September 17, 2007, the Board wrote to the Respondent, advising that, due to the failure of the Respondent to comply with the letter of August 2, 2007, the Board had made arrangements for the removal of the Solar Bronze film. This letter provided notice to the Respondent that access to her unit was required for its removal.

[12] On November 2, 2007, the Board again wrote to the Respondent, informing her that two dates and times had been booked for the removal of the film. It advised that, if the Respondent failed to comply with the removal of the film on either of these dates, the Board would take legal action. The film was not removed and the Applicant commenced this application on December 20, 2007.

Legislation and Authorities

a) The *Act*

[13] Section 67 of the *Condominium Property Act*, R.S.A. 2000, c. C - 22, reads in part:

> 67(1) In this section,
>
> > (a) "improper conduct" means
> >
> > > (i) non-compliance with this Act, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner,

> (ii) the conduct of the business affairs of a corporation in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,
>
> (iii) the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party, . . .
>
> (b) "interested party" means an owner, a corporation, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit.
>
> (2) Where on an application by an interested party by means of an originating notice the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following: . . .
>
> (b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;
>
> (c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;
>
> (d) if the applicant suffered loss due to the improper conduct, award compensation to the applicant in respect of that loss;
>
> (e) award costs;
>
> (f) give any other directions or make any other order that the Court considers appropriate in the circumstances.

b) Bylaws

[14] Bylaw 48(b) provides in part that no owner of a unit shall do or permit any act to be done to permit a unit to be altered in any manner which will alter the exterior appearance.

[15] Bylaw 59 provides in part that nothing shall be hung or placed on any part of the common property or within a unit that is, in the opinion of the Board, aesthetically unpleasing when viewed from outside the unit.

[16] Bylaw 2(a) requires that the Corporation be given access to the units, at all reasonable times upon notice, for various purposes including inspecting, maintaining, repairing, replacing or renewing common property, or for the purpose of ensuring that the Bylaws are being observed.

c) Case Authorities Relied On

[17] The Applicant relies on ***Condominium Plan No. 932 2887 v. Redweik***, 43 R.P.R. (2d) 154 and ***934859 Alberta Inc. v. Condominium Corp. No. 0312180***, 2007 ABQB 640. In the former case a Master of this Court allowed the petition of a condominium corporation which was seeking an order directing the removal of structures which it submitted had been erected in contravention of the condominium corporation's bylaws. The Respondent owners did not dispute the validity of the bylaws but argued that the board had been unreasonable in its enforcement of them. The Master stated that he could find nothing in the *Act* indicating that the Court should become involved in adjudicating on questions of how a Board enforces condominium bylaws. Rather, he observed that: "If a sufficient number of the unit owners are unsatisfied with the By-laws in their present form, they should pass a special resolution to change them. If they are unsatisfied with the manner in which the present Board of managers is interpreting the By-laws, they should elect a different Board."

[18] In the latter case, a Justice of this Court set aside a decision of a Master who had found that a corporation's board had acted improperly in determining common expenses. The Justice concluded at paragraph 54, after reviewing the numerous cases referred to in his Judgment, that ". . . a Court should defer to elected Boards as a matter of general application" and ". . . should not lightly interfere in the decision of the democratically elected board of directors, acting within its jurisdiction and substitute its opinion about the propriety of the board of directors' opinion unless the board's decision is clearly oppressive, unreasonable and contrary to legislation". Rather, it is only "if improper conduct is alleged and a Court is satisfied that improper conduct has taken place, the Court, pursuant to Section 67(2) of the Condominium Act, may then direct and/or grant any of the remedies set out therein".

Issues

[19] To decide this application I must determine:

1. Whether the Respondent has failed to comply with the Bylaws by:

   (a) applying Solar Bronze film on the east-facing windows of her condominium unit, contrary to Bylaws 48(b) and 59; and

   (b) refusing to provide access to her unit for the purpose of removal of the film, contrary to Bylaw 2(a).

2. If one or more of the Respondent's actions referred to above constitute non-compliance with the Bylaws, whether this conduct is improper conduct within the meaning of the *Act*; and

3. If the Respondent has committed improper conduct, what the appropriate remedy is in the circumstances of this case. In particular, in answering this question I will consider whether the Board has itself committed improper conduct by acting in an oppressive or unfairly prejudicial manner or by unfairly disregarding the Respondent's interests.

Position of the Parties

[20] The Applicant submits that the Respondent is guilty of 'improper conduct' as defined in the *Act*. The improper conduct occurred when the Respondent failed to comply with the Bylaws, in particular Bylaws 48(b) and 59. In support of this assertion, the Applicant has entered as exhibits copies of all correspondence between the parties related to this matter.

[21] The Applicant argues that the application of the Solar Bronze film is a violation of Bylaw 48(b), as the Respondent has altered her unit in a manner which alters its exterior appearance. The Applicant submits that this also violates Bylaw 59, as this alteration to the common property is aesthetically unpleasing. Finally, the Respondent failed to allow the Board access to her unit (upon reasonable notice being provided), which the Applicant submits is a violation of Bylaw 2(a).

[22] The Respondent argues that she did not believe that she had contravened the Bylaws. Specifically, she submits that the tinting of the windows is not a structural alteration and is not aesthetically unpleasing. The Respondent points to other windows which have window applications which are arguably aesthetically unpleasing, but alleges that the Board has allowed these applications. The Respondent advises that she has contacted several residents of the condominium regarding the application of the Solar Bronze film, and these residents support her position that the tint is not aesthetically unpleasing. The Respondent has provided names and signatures of such residents in her Affidavit.

[23] The Respondent wishes that this matter be tabled before the Board at the Annual General Meeting, where information on the different shades of available film and the financial cost can be presented. Due to her wish to discuss this matter at the Annual General Meeting, the Respondent submits that it would have been premature to remove the film in the fall of 2007. The Respondent requests that the Court grant an order requiring that the matter be tabled at a special meeting of the Board.

Analysis

1. Whether the Respondent is non-compliant with one or more Bylaws

[24] The thrust of the Respondent's argument in relation to Bylaw 48(b) is that she has not altered the structure of her unit by installing tinted film. However, Bylaw 48(b) does not require a structural alteration. It provides that an owner may not do or permit anything which will either

"alter the exterior appearance" or "the structure". Here, the tinting of her east-facing windows did alter the exterior appearance of that portion of her unit, albeit in a rather subtle manner.

[25] In relation to Bylaw 59, the Respondent argues that the application of tinted film to her east-facing windows is not "aesthetically unpleasing". She relies on statements she obtained from five other unit owners who share her opinion. However, the opinion that matters under Bylaw 59 is that of the Board, not the opinion of individual owners.

[26] The Respondent also argues that there are other windows on the east side of the building which are not uniform in appearance and which are less aesthetically pleasing than her own. In particular, she has provided photographs showing that one owner has applied aluminium foil to the windows and that another owner has curtains of a different colour than the others on that side of the building. However, that there may be other owners who may have breached the Bylaws (or other owners who may have obtained the Board's approval to alter the appearance of their windows) does not justify non-compliance by this owner.

[27] It is clear from the evidence that the Respondent was aware that she required approval from the Board before installing the tinted window film. The Board was clear in authorizing only a clear film and in refusing to approve coloured or tinted film. The Respondent acknowledged in her July 30th letter that she did not intentionally disregard the Board's decision but had chosen to proceed with the unapproved tinted application because it was removable and she wished to take advantage of an opportunity to have the bronze-tinted film applied before she received approval. In doing so, she ran the risk (soon realized) that the Board would not approve the tinted film and would insist on its removal.

[28] In installing the tinted film without Board approval the Respondent knowingly breached the Bylaws. In failing to provide access to her unit for the purpose of removing the film, after she had failed to do so herself, the Respondent breached Bylaw 2(a). The Bylaws are clear. The decision of the Board not to approve the Solar Bronze film and to decide that it was not aesthetically pleasing were decisions made within its authority under the Bylaws.

2. Has improper conduct occurred?

[29] Having found that both the installation of the unapproved tinted window film, as well as the failure of the Respondent to provide access to her unit for the purposes of its removal following reasonable notice from the Board, constitute breaches of the Bylaws of the condominium, it follows that the Respondent has engaged in "improper conduct" within the meaning of s.s. 67(1)(a)(i) of the *Act*.

3. Appropriate Remedy

[30] I agree with Justice Chrumka's conclusion in ***934859 Alberta*** that I ought not to interfere in the Board's decisions, nor to substitute my own opinion about the tinting of windows in this

condominium, unless I conclude that the Board's decision was clearly oppressive, unreasonable or contrary to legislation.

[31] The evidence shows that the Applicant has a history of maintaining consistency of external appearance of the building. The Respondent was clearly aware of this and of the requirements of the Bylaws as she wrote to the Board to request approval for the application of the film. The Board responded, authorizing only a clear film and providing an explanation for its decision. I cannot find that either the Board's actions or its decision were oppressive, unreasonable or contrary to legislation. Nor can I conclude that the Board acted unfairly prejudicially towards the Respondent or that it unfairly disregarded her interests. To the contrary, it provided approval to the application of a clear film originally requested by the Respondent, recognizing that she believed this would alleviate the heat problem in her unit. It was prepared to consider the matter of applying similar film to other units in the building once it received information from her concerning the effectiveness of the film.

[32] Notwithstanding the Board's clear decision and the Respondent's knowledge that she was acting without the required approval for the coloured film, she now asks that I relieve from the consequences of this decision by allowing the tinted film to remain until the matter can be dealt with at either an annual general meeting or a special meeting of the Board. However, in this regard, I concur in the comments made by the Master in the ***Redweik*** case that a board should be entitled to make reasonable efforts to enforce its bylaws and the Court ought not to become involved in adjudicating on the reasonableness of the board's enforcement action. When the Respondent purchased a unit in the condominium, she was aware that the condominium's management would be undertaken by an elected Board of Directors. Before applying tinted film to the east-facing windows of her unit, it was open to her to either:

1. seek Board approval to the Solar Bronze film by convincing the Board of the correctness of her position; or

2. seek to obtain sufficient support to compel an extraordinary meeting pursuant to Bylaw 17, for the purpose of discussing and seeking approval to the tinting of windows in the condominium;

3. have the issue of window-tinting dealt with at the next annual general meeting of unit owners.

Ultimately, if approval was not forthcoming, it was also open to the Respondent to seek support from other unit owners to elect to the Board directors who share their opinion with respect to the window-tinting issue.

[33] The Respondent applied the unapproved window tint at her own risk and chose not to use any of the means available to her to obtain approval prior to incurring the expense of installing it, an expense which, from the Respondent's evidence, was approximately $280.00 for a 2-pane

window. The application of tinted film was clearly in contravention of the Bylaws, as was the Respondent's refusal to provide access to the Board so that the unapproved film could be removed.

[34] The Respondent's improper conduct was not carried out unknowingly or inadvertently. The Respondent was clearly aware that she required approval and proceeded to act without the required approval. She took a chance in installing the unapproved film in the hope that the Board would ultimately approve its installation. She did so knowing that the film could be removed if necessary. In these circumstances the appropriate remedy is for her to remove the unapproved tinted film. It is also appropriate that, if she fails to do so, the Board should be allowed to enforce its rights under Bylaw 2(a). The Respondent ought to bear the costs incurred by the Applicant in connection with this matter.

Conclusion

[35] Accordingly, I allow the application. I direct that the Respondent cease the improper conduct constituted by her application of the bronze-tinted film by removing same within ten days of the date of service upon her of this Memorandum of Decision, or any related Order reflecting its terms, failing which the Applicant shall be authorized to enter the Respondent's unit upon seven clear days' notice for the purpose of effecting the removal of the bronze-tinted film. Any costs incurred by the Applicant in such removal shall be borne by the Respondent, together with the Applicant's costs of this application.

Heard on the 29th day of January, 2008.
Dated at the City of Edmonton, Alberta this 25th day of March, 2008.

D.L. Shelley
J.C.Q.B.A.

Appearances:

R. O. Langley
for the Applicant

D. B. Roth
for the Respondent