Court of Queen's Bench of Alberta

Citation: Owners: Condominium Plan No. 982 2595 v. Fantasy Homes Ltd., 2008 ABQB 584

Date: 20080924
Docket: 0403 20763
Registry: Edmonton

Between:

The Owners: Condominium Plan No. 982 2595

Applicant

- and -

Fantasy Homes Ltd.

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice Donald Lee

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[1] The Applicant, The Owners: Condominium Plan No. 982 2595, seeks to have dismissed the Respondent's appeal from the decision of Master Smart, now reported at 2006 ABQB 325, and upon dismissal of the Appeal, enforcement of the Applicant's caveat creating a charge against an owner's unit in the same manner as a mortgage [Section 39(8) and (9) of the *Condominium Property Act*, R.S.A. 2000, c. C-22 (the "Act")] for the amount of a contribution levied upon the owner but unpaid by the owner. The owner in question is the Respondent.

[2] This litigation was commenced by Originating Notice filed on October 22, 2004. The Applicant condominium corporation had imposed a levy upon the Respondent, as owner, in the amount of $82,000 plus interest at 18% on any unpaid balance. The levy was made pursuant to an amendment to the Applicant's bylaws. The amendment to the bylaws was filed at the Land Titles Office for the North Alberta Land Registration District on September 21, 2004. Pursuant to

Section 39(7), a caveat for the amount of the levy plus interest was filed against the title of a single condominium unit owned by the Respondent on September 21, 2004.

[3] In 2005 the unit in question was sold by the Respondent. On October 25, 2005, the net sale proceeds were frozen by Order of Justice Germain and placed on deposit with the Clerk of the Court.

[4] Also in 2005, the Applicant obtained an initial Order in the nature of a mandatory injunction, granted by Justice C.P. Clarke on November 25, 2005, directing that a certain engineering firm investigate the requirements for a certain retaining wall and thereafter design and prepare drawings for the same.

[5] In due course, a wall was designed. The wall design depicts a retaining wall rising on average more than a yard above grade, extending across the width of the condominium parcel, and crowned along its length with a community-standards privacy fence. The wall design is intended to lead to construction of a wall that will bring the Applicant's condominium project into compliance with mandatory urban planning requirements respecting cross-lot drainage.

[6] The need to complete these works, together with laying a finishing coat of asphalt on the project's single common roadway has been the principal objective of the Applicant's action.

[7] During 2006, further Orders of the Court enabled the Applicant to obtain effective drawings, satisfactory to the City of Edmonton and ATCO Gas, for the construction of a wall along with necessary grading.

[8] However irrespective of all the fairly complex development issues related to the design of the wall, the Applicant continued to maintain its claim that it was entitled to file a caveat upon the title of the Respondent's single remaining condominium unit for the amount of the contribution plus interest. The specific amount of the contribution, namely $82,000, was identified after a reserve fund study commissioned by the Applicant determined that a special levy in that amount was required to initially fund the reserve fund. The reserve fund report was prepared by a qualified person within the meaning of the Act and the Regulation, and it was the amount of that required levy that formed the basis of the Applicant's bylaw amendment and filing of a caveat in 2004.

[9] On May 3, 2006, Master Smart gave his Order upholding the validity of the Applicant's caveat. It is from that Order that the Respondent appealed. It is that Appeal that the Applicant now seeks to have dismissed.

[10] By late 2006 the Applicant had two courses of action open to it, both of which had been pleaded in the Originating Notion that had commenced this action rate of 18% per annum arising from the specific recommendation made in the reserve fund study.

[11] In what the Applicant described as Part 1 of the Originating Notice, the Applicant sought an Order or Orders upholding the validity of its caveat, filed in respect of its levy of a

contribution of $82,000 together with interest at the rate of 18% per annum arising from the specific recommendation made in the reserve fund study.

[12] In what the Applicant described as Part 3 of the Originating Notice, the Applicant sought an Order or Orders for compensation in such amount as the Court might determine to be sufficient to complete construction of the elements of the Applicant's common property set forth in the reserve fund study.

[13] With the benefit of hindsight, the applicant says that at a point in this litigation it elected to pursue its remedies claimed under Part 3 of its Originating Notice, i.e. those given it under Section 67 of the Act, and then expanded on this by seeking an Order in the nature of summary disposition under Rule 409 of the *Rules of Court*. The Application made in that regard was dealt with by me on January 18, 2007, and gave rise to an Order directing a trial of the action in written Reasons now reported at 2007 ABQB 32.

[14] While the Applicant elected to pursue its remedies under Section 67 of the Act and, effectively then held in abeyance its original application taken under Section 39 of the Act, it did so after determining, in its opinion, the costs required to construct the essential project works. It formed its opinion based on the opinion of a professional quantity surveyor as to current construction costs. The Applicant believed that those costs would far exceed the amount identified in the reserve fund study.

[15] In electing to make its application under Section 67, the Applicant acted in the belief that although the Respondent appeared to be an inactive former development company and likely had no remaining assets, a judgment could be entered possibly to catch an overlooked asset or, at the least, preclude the shareholders of the Respondent company from using it again.

[16] These considerations gave rise to the Applicant's election to put in abeyance its original approach to the litigation, which had led to the decision of the Master in Chambers; and instead advance a claim for compensation under Section 67 of the Act based on the professionally calculated construction costs.

[17] Although the Respondent's appeal relates to the Master's Order given in respect of its Section 39 remedies, it is submitted that Section 67 enables the Applicant to ask for an award of 'compensation' where the Court is satisfied that improper conduct has taken place. The Applicant cited numerous examples of the Respondent's conduct that it said amounted to 'improper conduct' and asked for compensation. The compensation that this Applicant sought, made against the Respondent as 'developer' within the meaning of Section 67 the Act, was well in excess of $200,000, based on the opinion of the professional quantity surveyor.

[18] With benefit of hindsight as to its course of action, the Applicant condominium corporation, comprised of 20 owners argues that it is now faced with the prospect of incurring the costs of a several day trial in Court of Queen's Bench that, despite all the apparent strengths of the Applicant's claims, might or might not proceed as scheduled, might or might not lead to

the outcome sought, and that might or might not lead to a judgment against a Respondent that may or may not have any assets other than its claim on monies already paid into Court.

[19] The Applicant now returns to its initial Application made under Section 39 of the Act. In respect of its Application made under Section 39 of the Act, the Applicant makes the following submissions:–

1. In pursuing its remedies under Section 39 of the Act, the Applicant moves against the Respondent, not as 'developer', but rather as an 'owner';

2. As such, the Applicant's authority is, essentially, unrestricted and without answer; and,

3. The Respondent's only redress is available under the same Section 67 in which the Respondent would say, as an owner (and not developer) that the Applicant's conduct is "improper".

[20] It is submitted that it was in exercise of those summary powers that the applicant's initial steps in this action were taken. The validity of the resulting caveat that was filed by the Applicant, and the steps leading up to the filing of the caveat, were those which were upheld by the Master in Chambers. Those initial steps were taken under Section 39 of the Act are it is contended complete in themselves, and given the weight of judicial opinion should not be lightly reviewed by the Court.

[21] In this Application, the Applicant seeks to have the Respondent's appeal from the decision of Master Smart dismissed; and upon dismissal of the Appeal, enforcement of the Applicant's caveat creating a charge against an owner's unit in the same manner as a mortgage [Section 39(8)(9)], for the amount of a contribution levied upon the owner but unpaid by the owner [Section 39(7)].

[22] The process in this application is abbreviated in that the equity in the owner's property has been reduced to cash on deposit with the Clerk of the Court. The Applicant seeks an Order in the nature of final foreclosure, extinguishing the Respondent's equity, and granting judgment for the amount of the charge together with interest.

[23] As to the Order from which the Respondent appeals, the Master in Chambers upheld the validity of a caveat filed for the amount of a contribution made upon an owner's unit. A "contribution" as described in the Act, is an amount of money that derives from the exercise of a specific power granted condominium corporations, namely, to establish a fund for administrative expenses sufficient for the discharge of any obligation of the condominium corporation and then levy "contributions" on the owners in proportion to the unit factors of the owners' respective units or "if provided for in the bylaws on a basis other than in proportion to the unit factors of the owners' respective units" [Section 39(a)(b)(c)].

[24] Determining of the amount of the contribution is given over to the condominium corporation, expressly in the Act, as being a sufficient amount "in the opinion of the corporation" [Section 39 (1) (a)]. It is submitted that the Legislature, by use of the phrase "in the opinion of the corporation", is empowering the corporation to act without restraint except where otherwise provided for in the Act.

[25] Once a condominium corporation makes its determination of the amount of a contribution, it is further empowered to certify the amount, manner of payment and interest owing on any unpaid balance of a contribution and, upon certification, the certificate is "conclusive proof of the matters certified" [Section 39(6)]. It is submitted that the language of the statute again empowers the corporation to act without restraint except where otherwise provided for in the Act.

[26] The Applicant argues that it has expressly certified by reason of commencing this litigation the amount, manner of payment and interest owing on any unpaid balance of the contribution levied upon the Respondent, as owner of a unit.

[27] The Applicant submits that the Respondent, as owner, has no reply or recourse to the course of action pursued by the Applicant under Section 39; and that the Respondent's only redress is contained in Section 67 of the Act. The Respondent can claim that the Applicant has acted with "improper conduct" and ask the Court for redress. This is a remedy that is open to the Respondent as an 'owner'; but not as a 'developer'.

[28] A developer is not included as an "interested party" entitled to pursue the complaint process contained in Section 67(1). However, the Respondent is an "owner". As such, the Respondent can claim that the Applicant condominium corporation has not complied with the bylaws or conducted its business affairs in an oppressive, prejudicial manner.

[29] The Master dealt with this argument, in paragraphs 25 through 27 2006 ABQB 325, as follows:

> ¶ 25 Section 67 deals with Court ordered remedies where there is improper conduct. Presumably Fantasy would fall under Section 67(1)(a)(ii) and (iii), that is, the conduct of the business affairs of the Corporation or the exercise of the powers of the board is oppressive or unfairly prejudicial to or unfairly disregards the interest of Fantasy as an owner. The Court is given the power under Section 67(2) to summarily deal with abuse by the Condominium Corporation or its board and declare the subject Caveat improper together with directing its discharge. Apparently Fantasy expects that the Court would disregard the effect of Section 67(1)(a)(iv) which also defines improper conduct to include where the business affairs of a developer is conducted in a manner that is oppressively or fairly prejudicial to or that unfairly disregards the interests of an owner, purchaser or perspective purchaser of a unit. Clearly this section brings forward again the concept of fairness. The Court must look to all of the facts relevant to its assessment of conduct. In assessing the fairness of the situation the Court must examine the purported improper conduct of the Corporation and its Board in light of the owner/developers

alleged improper conduct. Regardless, it seems that the Court is in a position to grant a number of remedies to deal with circumstances which fall under improper conduct.

¶ 26 The legislature did not enunciate circumstances where the Corporation by By-law could or should allocate financial obligations other than by way of unit factor. It is likely safe to say that this particular fact situation was not one that was brought forward as an example to justify this ability to allocate but that does not make it any the less applicable. In my view what the legislature recognized was that depending on the facts and circumstances having regard to Section 67 there may be an infinite number of circumstances where assessment otherwise than by way of unit factor would be appropriate.

¶ 27 Having regard to the purpose and objectives of the Act, I have no difficulty concluding on the basis of fairness that this is a proper circumstance for allocation against one owner's unit albeit arising from what appears to be misconduct of that owner as a developer. I am bolstered in my view in reaching this conclusion as otherwise the developer would retain a benefit for itself by in effect taking a profit while failing to meet its obligations to the Condominium Corporation which by definition is all of the owners including the developer as owner.

[30] The reasoning of the Master has been followed by Justice Chrumka in ***934859 Alberta Ltd. v. Condominium Corporation No. 0312180,*** 2007 ABQB 640; and the reasoning of Justice Chrumka has been followed by Justice Shelley in ***The Owners: Condominium Plan No. 7722911 v. Ronae Marnel***, 2008 ABQB 195. The Court in those cases held that the Court should not interfere in the decisions of a Board of Directors of a condominium corporation unless there is shown to be improper conduct.

[31] In this case, the Respondent does not argue that Section 67 applies so as to give grounds upon which the Applicant's position should be overturned. It is submitted that even if the Respondent had so argued, this Court has been presented with no evidence of improper conduct by the Board. On the contrary it is submitted that the Applicant was only fulfilling its statutory duty to produce and adopt a reserve fund plan when it was presented with a reserve fund report that called for an initial contribution to the reserve fund of $82,000. The Applicant then followed a course of action, open to it under Section 39, of levying the entire amount of the required contribution on the one unit in the project owned by the Respondent.

Conclusion

[32] The Applicant asks that the Appeal of the Respondent from the decision of the Master be dismissed; and that this Court bring this matter to a conclusion by Ordering that the monies held on deposit be paid to the credit of the Applicant to reduce the amount of the Respondent's contribution together with interest.

[33] However this matter was already heard and decided by me in January 2007. Both the appeal, and Mr. Long's attempt to seek summary disposition of this matter were before me on January 12, 2007 during a Special Chambers application.

[34] In paragraphs 30 through 39 of my Reasons for Judgment, 2007 ABQB 32 I canvassed the issues raised by the Respondent, and I concluded as follows:–

> ¶ 46 In the present application, the Condominium Corporation has made a compelling case against Fantasy Homes Ltd. and its principal owner John Van Leenen. It is also clear from other materials provided to the Court that John Van Leenen has less than a sterling reputation in the development and housing field. However Mr. Van Leenen and his company Fantasy Homes Ltd. have provided enough information in this case which establishes that there is some dispute on the facts herein, or some doubt as to the law.
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> ¶ 47 As such I conclude that Mr. Van Leenen and his company Fantasy Homes Ltd. have been able to go beyond simply denying the allegations, something that alone would not be sufficient to resist this application for summary judgment. Although tenuous, Mr. Van Leenen and his company have put enough material facts in dispute, and have raised enough legal issues that I have decided that the rights of these parties should not be dealt with in a summary manner, but regrettably will have to dealt with by a trial of an issue.
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> ¶ 48 Accordingly the application for summary judgment is not granted, and the parties are directed to proceed to what I understand would be a three day trial of an issue on the points in dispute.

[35] This matter was again heard and decided by me in August 2007. By Notice of Motion filed July 6, 2007 and returnable August 3, 2007, Mr. Long again ought summary disposition of this matter and a dismissal of the appeal. In open Chambers, I re-affirmed my earlier ruling by directing dates for the completion of examinations, the exchange of expert reports, and for a conditional certificate of readiness as follows from the Clerk's notes of August 3, 2007:–

14:20:39	COURT	Orders: 60 days before Trial all witness reports are to be provided and exchanged
14:21:17	COURT	Orders: al examinations for discovery shall be concluded by mid October 2007
14:21:41	COURT	Orders: in addition to the examinations for discovery, all examinations on undertakings shall also be concluded by mid October 2007
14:22:16	COURT	Orders: this Courts is prepared to issue a conditional certificate of readiness today

14:24:16	COURT	DIRECTS: JUSTICE LEE SEIZED AS CASE MANAGING JUSTICE

[36] Accordingly I conclude notwithstanding the sympathy I have for the Applicant's plight as an apparent result of the Respondent's actions/inaction, and notwithstanding the innovative and determined efforts of the Applicant, that the matter has already been decided by me and there will have to be a trial of an issue on the points in dispute as previously ordered.

[37] The Respondent Defendant also argues that in light of the Applicant's willful, continuing, contemptuous ignoring of my previously granted Orders I should direct the dismissal of its action together with an award to the Applicant of costs on a solicitor and his own client basis. I decline to make any contempt finding, or order costs on any basis other than regular party and party costs for this failed application.

Heard on the 22nd day of September, 2008.
Dated at the City of Edmonton, Alberta this 24th day of September, 2008.

Donald Lee
J.C.Q.B.A.

Appearances:

Curtis Long
for the Applicant

Brock I. Dagenais
for the Respondent

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