Court of Queen's Bench of Alberta

Citation: Dykun v. Cravenbrook Condominium Corporation No. 032 1893, 2009 ABQB 104

Date: 20090219
Docket: 0803 14954
Registry: Edmonton

Between:

John Dykun

Applicant

- and -

Board of Directors Cravenbrook Condominium Corporation No. 032 1893, and Estate Properties Incorporated

Respondents

Memorandum of Decision
of the
Honourable Mr. Justice Sterling Sanderman

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[1] On January 31, 2008 the owners of units in the Cravenbrook Condominium Corporation No. 032 1893 were given notice by letter of a special assessment that would affect all of them. The Board of Directors of the Cravenbrook Condominium Corporation levied a special assessment in the amount of $80,000.00. The amount that each owner would have to pay was based upon unit factors. Mr. Dykun, a condominium owner, was assessed a sum of $800.00. He took exception to this special assessment and has resisted all efforts to collect it from him. He commenced an action that brought the matter to court on January 30, 2009. He sought the following relief from the court:

1. A determination of improper conduct of the Respondents.

2. A determination that the special assessment be declared null and void.

3. Directing the respondents to refund to unit owners all the special assessments to them or in the alternative, 60% of the special assessment contributions.

4. Directing the Respondents to remove the caveat currently registered against the property legally described as 39-155 Crocus Crescent, Sherwood Park, Alberta and all related costs.

5. Directing the Respondents to develop a 5-year reserve fund plan and distribute a copy to all unit owners.

6. Directing the Respondents to convene a special general meeting to hear the filed appeal of the Applicant.

7. Directing that the amount of $2,000 held as security for costs be returned to the Applicant.

8. Directing the Respondents to convene the extraordinary general meeting as requested by unit owners on July 2nd, 2008.

9. Costs of this action.

[2] The Board of Directors of Cravenbrook Condominium Corporation did not act beyond their jurisdiction in requesting this special assessment nor did they act precipitously. In fact, the Board sought the advice not only of their legal counsel but of their accountant. It was necessary for the Board to do something to deal with a problem that presented itself in December of the previous year.

[3] On December 1, 2007 the manager responsible for Cravenbrook was replaced. The new manager discovered that the previous manager took money from the Cravenbrook reserve fund to pay operating expenses. This action was in direct contravention of Regulation 27 of the condominium property regulation AR 168/2000 which states:

> 27(1) A corporation must maintain the funding of its reserve fund at an appropriate amount or in an appropriate state so that the requirements of section 38 of the Act continue to be met.
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> (2) Except for the purposes of paying for repairs to or replacement of depreciating property, neither a corporation nor any person holding money or dealing with money on behalf of the corporation is to commingle any funds that make up the corporation's reserve fund with the corporation's operating funds or any funds of any other corporation or other entity.
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> (3) Neither a corporation nor any person holding money or dealing with money on behalf of the corporation is to commingle any funds that make

> up the corporation's reserve fund with the funds that make up any other corporation's reserve fund.
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> AR 168/2000 s27;108/2004

[4] A review of the financial affairs of Cravenbrook by the new manager revealed a fairly dire situation. On December 31, 2007 Cravenbrook had only $238.00 in its operating account and had approximately $32,000.00 of unpaid bills it had to meet. In addition to this, the sum taken from the reserve fund to pay operating costs by the previous management had yet to be repaid. This was a sum in excess of $31,000.00.

[5] The problem facing the new manager was how to meet the existing operating obligations and repay the amount that had been improperly removed from the reserve fund. In addition to this, a contribution had to be made to the reserve fund for the fiscal year ending August 31, 2008.

[6] Advice was sought from Mr. E. Mirth, Q.C., counsel for Cravenbrook's Board and from its auditor and accountant, Barbara L. Surrey, CMA.

[7] The advice given resulted in the Board issuing a special assessment against the owners. This special assessment was made pursuant to Article 48 of Cravenbrook's by-laws. That by-law states:

> If at any time it appears that the annual assessments or contributions towards the Common Expenses will be insufficient to meet the Common Expenses, the Corporation may assess and collect special contribution or contributions against each Unit in an amount sufficient to cover the additional anticipated Common Expenses. The Corporation shall give notice of such further assessment to all Owners which shall include a written statement setting out the reasons for the assessment and each assessment shall be due and payable by each Owner in the manner and on the date or dates specified in the notice. Each such special contribution shall be determined and assessed against the Owners in proportion to their Unit Factors. All such special contributions shall be payable within ten (10) days of the due date for payment as specified in the notice and if not paid shall bear interest at the Interest Rate from the due date until paid.

[8] In fact, Mr. Dykun concedes in his written materials that this option was always open to the Board of Directors. His complaint is that they adopted it without looking at other preferable courses of action.

[9] A properly constituted Board of Directors acting pursuant to a by-law after having sought advice from experts in relation to how to handle an emergency made a decision in good faith.

Mr. Dykun objected to this decision and refused to pay his portion of the special assessment. For close to a year he has been involved in a dispute with the Board of Directors in relation to the action they took. His position is that this special assessment was not necessary and there were other alternatives that should have been pursued. He has recommended alternative courses of action that have been rejected by the Board of Directors. Still, he insists that he is right and they are wrong. Unfortunately, this matter had to come to court. A tremendous amount of time, energy and effort have been wasted since Mr. Dykun refused to pay the special assessment.

[10] Mr. Dykun is an energetic individual who has invested a significant amount of his time and money in advancing his cause. He was ordered to pay $2,000.00 in security for costs before he could argue his case. It cost him $200.00 to file his Notice of Motion. He has filed voluminous materials with the court. He was well prepared when he argued this matter on January 30, 2009. He covered the points he desired to make in a polite but forceful fashion. He has training in the field of accounting and has had a successful career with the federal government. Unfortunately, he suffers from tunnel vision and only sees what he wants to see. He is prone to making false assumptions.

[11] His logic is flawed. He has reviewed a number of accounting documents created by different individuals. Some were prepared by the previous managers who appear to have mismanaged the operation of the condominium. Mr. Dykun does not differentiate between these documents and any prepared by other individuals. His review of all of the documentation he has provided to the court leads him to the conclusion that the special assessment was not needed. His analysis then proceeds backwards from that assertion. If the money was not needed there was a breach of the rules in asking for the special assessment.

[12] He does not acknowledge that there is room for any other point of view. He claims that he is right and they are wrong. He completely ignores the evidence presented to the court that contradicts his position. He is incapable to accepting any suggestion that he may be wrong.

[13] The alternative plan that he proposes does not remedy or rectify the immediate problem created by the previous manager. It does not correct the immediate problem of returning the reserve fund to a level required by the *Condominium Property Act* RSA 2000 cC-22. S.38 states:

> 38(1) A corporation shall subject to the regulations, establish and maintain a capital replacement reserve fund to be used to provide sufficient funds that can reasonably be expect to provide for major repairs and replacement of
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> (a) any real and personal property owned by the corporation, and
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> (b) the common property,

where the repair or replacement is of a nature that does not normally occur annually.

(2) Notwithstanding subsection (1), funds shall not be taken from a capital replacement reserve fund for the purpose of making capital improvement unless

(a) the removal of funds for that purpose is authorized by a special resolution, and

(b) after the removal of funds pursuant to the special resolution, there are sufficient funds remaining in the capital replacement reserve fund to meet the requirements of subsection (1).

(3) The money in the capital replacement reserve fund of the corporation is an asset of the corporation and no part of that money shall be refunded or distributed to any owner of a unit except where the owners and the property cease to be governed by this Act.

[14] On the evidence that has been presented on this application, it is abundantly clear that the Board of Directors has acted in a prudent and responsible fashion. Presented with an urgent problem they sought professional advice in relation to what solution should be embraced. After receiving the advice they followed a course of action that was in the best interests of those who are members of the condominium corporation. It was incumbent upon them to rectify the breach of the governing legislation that had been authored by a previous manager. They cannot be faulted for what they did.

[15] Even assuming that Mr. Dykun's solution was an appropriate one, he cannot force his views on the Board of Directors. Management of the affairs of Cravenbrook rests with the board and not with any single unit owner. The Board has been properly elected to oversee Cravenbrook's affairs. Mr. Dykun has not. Mr. Dykun cannot dictate to the board the course of action that they should be following. If he is interested in having a greater say in how the overall affairs of Cravenbrook should be managed, he should seek election to the board of directors.

[16] Mr. Dykun's application is dismissed in its entirety. The various forms of relief that he has requested are tied to his contention that the special assessment was improperly and unnecessarily ordered by the Board of Directors. I have rejected that argument. All of the other relief that he requests is tied to that central allegation. I have found that the actions of the Board were justified in this set of circumstances. There is neither a factual or legal basis for the relief he seeks. The bylaws of the corporation do not give him a right of appeal in relation to the special assessment. He has not established the basic requirements to convene an extraordinary general meeting to rescind the special assessment.

[17] If the parties cannot agree to costs in relation to this application, they may approach me to speak to them within the next 60 days.

Heard on the 30th day of January, 2009.
Dated at the City of Edmonton, Alberta this 18th day of February, 2009.

Sterling Sanderman
J.C.Q.B.A.

Appearances:

John Dykun
self represented

Todd A. Shipley
for the Respondents