Court of Queen's Bench of Alberta

Citation: Condominium Plan No. 762 1828 v. Marusyn, 2010 ABQB 523

Date: 20100812
Docket: 0903 17511
Registry: Edmonton

2010 ABQB 523 (CanLII)

Between:

The Owners: Condominium Plan No. 762 1828
o/a Claregreen Mews

Applicant

- and -

Gail P. Marusyn

Respondent

Memorandum of Decision
of the
Honourable Madam Justice L. Darlene Acton

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[1] The Owners of Condominium Plan No. 762 1828 (the "Condo Corporation") apply for a court order compelling Ms. Marusyn to allow access to her condominium unit in order to repair and replace the overhead garage door, the exterior garage person door, and the front door, including all framing and assembly components.

[2] Ms. Marusyn opposes this application and submits that the exterior doors, garage door and windows are unit property over which she has exclusive control, and that the Condo Corporation has no right to impose its wishes upon her to change the exterior doors or windows.

[3] The main issue in this application is the ownership of the exterior doors and windows and whether the legal obligation to repair, maintain and replace the exterior doors and windows rests with the Condo Corporation or with individual unit holders. The answer to this question depends

on my determination of whether the exterior doors and windows form part of the common property.

[4] The Condo Corporation was first incorporated in 1976 and consists of 98 townhouse-style units with garages. Ms. Marusyn purchased Unit 74 in 1989, at which time she was told that she was responsible for the front door, the overhead garage door and the person door leading into her garage.

[5] In late 1998 and early 1999, Ms. Marusyn replaced three windows, the front door and the garage door of her unit based on the understanding that it was her responsibility to keep these items in good repair. She incurred the full cost of replacing the windows and doors. She obtained the approval of the Condo Corporation before replacing her door to ensure it met with the Condo Corporation's standards and requirements.

[6] In 2007, the Condo Corporation took steps to replace the front entrance doors to the condominium units. Ms. Marusyn refused to have the front entrance door to Unit 74 replaced and requested that the Condo Corporation refund part of a special assessment levy relating to the door replacement back to her.

[7] In 2009, the Condo Corporation decided to replace the overhead garage doors and exterior garage entry doors of the condominium units and passed a special assessment levy to raise money for the door replacement. Ms. Marusyn again refused to have the overhead garage door and exterior garage entry door of Unit 74 replaced, and requested a refund of the special assessment she had paid.

[8] The question: are the doors and windows of Unit 74 part of the unit, or are they common property?

[9] Section 9 of the *Condominium Property Act*, R.S.A. 2000, c. C-22 (the "Act'), sets out the boundaries of condominium units and states the following regarding doors and windows:

> 9(2) Notwithstanding subsection (1),
>
> (a) all doors and windows of a unit that are located on interior walls of the unit are part of the unit unless otherwise stipulated in the condominium plan, and
>
> (b) **all doors and windows of a unit that are located on exterior walls of the unit are part of the common property unless otherwise stipulated in the condominium plan**.
>
> (3) For the purposes of subsection (2), a reference
>
> (a) to a door includes the door, the door frame and the door assembly components, if any, but does not include the door casing, trim or mouldings, and

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(b) to a window includes the glazing, the window frame and the window assembly components, if any, but does not include the window casing, trim or mouldings.

(4) Notwithstanding subsections (1) and (2), **if a condominium plan was registered prior to January 1, 1979**, the common boundary of any unit described in the condominium plan with another unit or with common property is, **unless otherwise stipulated in the condominium plan**, the centre of the floor, wall or ceiling, as the case may be.

[Emphasis added.]

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[10] Section 9(2) and (3) had been amended by the *Condominium Property Amendment Act, 1996,* S.A. 1996, c. 12, which came into force on September 1, 2000. Before the amendments, all doors and windows were part of the unit unless otherwise stipulated in the condominium plan: *Condominium Property Act,* R.S.A. 1980, c. C-22, s. 7(2).

[11] In order to provide for some flexibility for owners whose doors and windows had been part of the unit property and were now deemed to be part of the common property, a new regulation also came into force on September 1, 2000, that allowed owners to pass a special resolution to amend the condominium plan so that doors and windows would cease being part of the common property and once again become part of the unit: *Condominium Property Regulation*, A.R. 168/2000, s. 72. This process was only available if the doors and windows had been part of the unit property before September 1, 2000, and if the condominium plan was amended to reflect a special resolution to have the doors and windows revert back to the unit before September 1, 2002.

[12] It does not appear than any such special resolution or amendment to the Condominium Plan made pursuant to s. 72 of the Regulations occurred in this case.

[13] Ms. Marusyn submits that the amended legislation in s. 9(2) does not apply to the Condominium Plan in this case because the exterior boundaries of Ms. Marusyn's unit include, by implication, the doors and windows. She bases her argument on the following wording included in the legend on the registered Condominium Plan:

ALL UNITS SHOWN ON THIS PLAN ARE COMPRISED OF THREE LEVELS BASEMENT FLOOR MAIN FLOOR AND SECOND FLOOR, GARAGE, BALCONY AND ATTIC ARE PART OF THE UNIT
THE COMMON BOUNDARY WITH THE COMMON PROPERTY IS THE OUTSIDE FACE OF THE OUTSIDE WALLS AND WITH ANY ADJACENT UNIT THE CENTRE OF THE PARTY WALL...

[14] Therefore, Ms. Marusyn submits that the default position regarding doors and windows as set out in s. 9(2) does not apply in this case, since the Condominium Plan stipulates otherwise.

As such, there would have been no need to trigger the special exemption or pass a special resolution under s. 72(2) in order for the doors and windows to remain part of the unit.

[15] To support her interpretation of the non-applicability of s. 9(2), Ms. Marusyn submitted a letter from Mr. D.J. Hagen of Hagen Surveys (1982) Ltd. Mr. Hagen was asked to review the Condominium Plan and in his opinion, the legend necessarily implies that the exterior doors and windows, being on the outside face of the outside walls, form part of the unit property.

[16] However, it is important to note that the words “doors and windows” are never specifically mentioned on the registered Condominium Plan or in the legend referred to in Mr. Hagen’s opinion letter.

[17] If it were not for the specific statutory provisions dealing with doors and windows in the Act and in the Regulations, I would agree with Ms. Marusyn.

[18] The interpretation of s. 9(2) and what is meant by the words “unless otherwise stipulated in the condominium plan” is the determining factor in this case. To stipulate something means that it must be set out specifically – not merely implied as Mr. Hagen concludes from his interpretation of the wording contained in the legend. I agree that Mr. Hagen correctly interprets the legend in terms of the exterior boundaries. However, his interpretation is not helpful in resolving the issue as the legend does not “stipulate” or specifically mention anything regarding the exterior doors and windows.

[19] It is also my view that in interpreting the effect of s. 9(2), one must apply the principle of statutory interpretation that the specific overrides the general. Using this principle, words referring to exterior doors and windows, which are specific items, will override words referring to boundaries or outside faces of outside walls, which are more general in nature. Therefore, s. 9 (2) does apply to this Condo Corporation and to Ms. Marusyn’s unit. I cannot find that the general words in the legend on the Condominium Plan pertaining to boundaries are sufficient to comply with the requirement of a “stipulation”.

[20] The clear intention of the amendments to the Act is to make the exterior windows and doors of all condominium units part of the common property in order that condominium corporations assume responsibility for the care, maintenance and cost of that expensive aspect of condominium property ownership.

[21] Ms. Marusyn submits that by interpreting the legislation in this way, the Legislature would be infringing on her property rights by essentially expropriating her real property. I disagree. In my view, there is nothing equivalent to expropriation in these circumstances as the amount of Ms. Marusyn’s estate in fee simple remains the same. She has lost none of her useable square footage, nor has there been any injurious affection or any other damage that might give rise to a claim under the *Expropriation Act*, R.S.A. 2000, c. E-13.

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[22] The amendments to the Act removed control over decisions involving windows and doors from the unit holder, but also imposed the responsibility and cost of repair and replacement on the shoulders of the Condo Corporation, which can usually effect repairs and replacements at a much lower cost due to economies of scale. Accordingly, this can create a significant benefit to the unit holder. While Ms. Marusyn may submit this is a burden upon her, such a submission fails to recognize that when a person takes ownership of a condominium unit, he or she agrees to be bound by the rules and regulations set out in the condominium bylaws, as well as the relevant legislation. Although this may constitute a burden in some situations, it can also create benefits unique to condominium living, as a group of like-minded owners can have greater influence in how their "neighbourhood" operates and develops over time than would be the case in a large urban neighbourhood in a city the size of Edmonton.

[23] In conclusion, the clear meaning and intention of s. 9(2) of the Act is to eliminate exterior doors and windows from the responsibility of individual owners and to place the responsibility for the care, maintenance and replacement of such items on to the shoulders of condominium corporations. No other interpretation makes sense when this legislation is read as a whole.

[24] Accordingly, the Condo Corporation's application for a declaration that the bylaws are valid and binding upon Ms. Marusyn is granted. Ms. Marusyn shall allow access to Unit 74 in order to allow the repair and replacement of the overhead garage door, the exterior garage door and the front door including all framing and assembly components. Her cross application is dismissed.

[25] The Condo Corporation shall receive its costs on Column 2 plus disbursements, unless offers of compromise were made such that the matter of costs needs to be further addressed, in which case counsel have leave to appear before me within 15 days of the date of this decision.

Heard on the 20th day of May, 2010.
Dated at the City of Edmonton, Alberta this 11th day of August, 2010.

L. Darlene Acton
J.C.Q.B.A.

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Appearances:

Hugh Willis
Duncan & Craig LLP
for the Applicant

Laura Levesque
Oglivie LLP
for the Respondent

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