In the Court of Appeal of Alberta

Citation: Owners: Condominium Plan No. 982 2595 v. Fantasy Homes Ltd., 2010 ABCA 39

Date: 20100205
Docket: 0903-0052-AC
Registry: Edmonton

Between:

The Owners: Condominium Plan No. 982 2595

Appellant
(Applicant)

- and -

Fantasy Homes Ltd.

Respondent
(Respondent)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice Peter Martin

Memorandum of Judgment

Appeal from the Decision by
The Honourable Mr. Justice D. Lee
Dated the 22nd day of September, 2008
Filed on the 2nd day of February, 2009
(2008 ABQB 584, Docket: 0403-20763)

Memorandum of Judgment

The Court:

[1] The appellant condominium corporation ("Condo Corp") appeals the chambers judge's decision declining to dismiss the appeal by the respondent developer, Fantasy Homes Ltd. ("Fantasy"), from a Master's decision and to enforce a caveat filed by the Condo Corp against Fantasy's title to a condominium unit in the subject project: 2008 ABQB 584.

I. Facts

[2] The facts of this case are twisted and tangled as a result of various procedural steps and several threads have been pulled at different times in the hope of bringing this matter to a conclusion.

[3] Fantasy developed a 20 unit condominium project known as Victoria Village. It managed the project until the owners elected a board of directors. At the relevant time, Fantasy was also the owner of one condominium unit in that project.

[4] The Condo Corp alleges that there were construction deficiencies associated with the condominium project's common property. In particular, it alleges that Fantasy, as developer, failed to complete construction in relation to curbs, gutters, paving, a retaining wall, fences, an electric gate, property identification signage and lighting.

[5] The Condo Corp commissioned a reserve fund study within the meaning of the *Condominium Property Act*, R.S.A. 2000 c. C-22, which determined that, in order to rectify the identified deficiencies in the common property allegedly attributable to the developer, a special levy in the amount of $82,000 was required to initially fund the reserve fund (the "Kerr Report").

[6] Since the Condo Corp was of the view that the $82,000 in repair costs was entirely attributable to Fantasy's construction deficiencies, it imposed the entire amount of the special levy plus interest at 18% on Fantasy as owner of a condominium unit in the project. To accomplish this, the Condo Corp amended its bylaws to permit the $82,000 to be levied on a basis other than in proportion to the unit factors of the owners' respective units. Under s. 39(1)(c) of the *Act*, contributions can be levied on other than a proportional basis "if provided for in the bylaws."

[7] Under s. 39(7) of the *Act*, the Condo Corp then registered a caveat for the unpaid assessment plus interest against the condominium unit owned by Fantasy.

[8] In its originating notice, the Condo Corp pleaded two courses of action which were open to it.

[9] First, it sought an order under s. 39 of the *Act* upholding the validity of its caveat registered against the unit owned by Fantasy in the amount of $82,000 plus interest.

[10] Second, it sought an order for compensation under s. 67 of the *Act* based on Fantasy's "improper conduct" in such amount as the court might determine to be sufficient to remedy the common element deficiencies identified in the Kerr Report.

[11] Fantasy subsequently sold its unit and the Condo Corp secured an order freezing the sale proceeds and ordering them to be paid into court.

[12] The Condo Corp later obtained an order allowing it to use some of the sales proceeds being held in court to retain an engineering firm to reassess the costs of completing the improvements contemplated by the Kerr Report. The resulting cost to complete report determined that the original estimate of $82,000 required revision, concluding that the cost to complete certain of the improvements then totalled $163,000.

[13] On May 3, 2006, a Master upheld the validity of the Condo Corp's caveat: 2006 ABQB 325. In so doing, he indicated that the sole issue before him was whether the Condo Corp's special levy against the single unit owned by Fantasy was valid and properly supported the caveat registered against that unit by the Condo Corp. He concluded that the answer to both questions was yes.

[14] The Master made no finding, however, as to the correctness of the quantum of the special levy. Indeed, he specifically noted that Fantasy disputed the amount needed to rectify the deficiencies and that this issue formed part of a larger action between the parties: see para. 1.

[15] The Master concluded, at paras. 27-28, that:

> ... 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 of the view that the By-law passed by the Condominium Corporation allocating the entire cost to rectify the deficiency as against Fantasy's unit is valid. It necessarily follows from that the Caveat is valid. In making this determination, I again note that *there remain outstanding issues between the parties which may affect the ultimate liability of Fantasy*. ... [Emphasis added.]

[16] Fantasy appealed the Master's decision on August 10, 2006.

[17] While the appeal of the Master's decision was pending, the Condo Corp elected to pursue its remedies under s. 67 of the *Act* after determining that the costs required to remedy the common

element deficiencies had increased substantially beyond the $82,000 amount identified in the Kerr Report and its corresponding $82,000 s. 39 caveat. The Condo Corp sought an order for summary judgment under Rule 409 of the *Alberta Rules of Court* in relation to its s. 67 claim.

[18] In reasons dated January 18, 2007, the Condo Corp's summary judgment application was dismissed and the chambers judge directed a trial of an issue "on the points in dispute". The chambers judge did not address the extant appeal from the Master's decision at that time since he was dealing only with the Condo Corp's summary judgment application in relation to s. 67 of the *Act*. No order was filed documenting this decision.

[19] Faced with the prospect of incurring the costs and risks of a several day trial of its s. 67 claim, the Condo Corp elected to instead proceed with the remedy it sought under s. 39 of the *Act*.

[20] To this end, in July 2007, the Condo Corp brought an application seeking dismissal of Fantasy's appeal from the Master's decision for want of prosecution and enforcement of the caveat. In the reasons appealed from on this appeal, the chambers judge describes this application, heard in August 2007, as another application for summary disposition that he had denied. During the August 2007 application, the chambers judge had seized himself as case management judge and ordered certain deadlines related to trial preparation.

[21] The Condo Corp did not appeal the August 2007 decision of the chambers judge. We do not have any reasons for the decision of the chambers judge. And here again, no order was filed documenting the decision of the chambers judge. According to the clerk's notes, during the hearing, counsel for the Condo Corp made submissions. The clerk's notes indicate that the matter of the appeal from the Master's decision "is what is regarded as truly being before the Court this afternoon."

[22] In July 2008, the Condo Corp again filed a notice of motion seeking dismissal of Fantasy's appeal from the Master's decision, either on the merits or for want of prosecution, and seeking to enforce its s. 39 caveat in the amount of $82,000 plus interest. The chambers judge dismissed this application in September 2008, leading to this appeal.

[23] The chambers judge's reasons are not entirely clear. In the end, he dismissed the Condo Corp's application. In so doing, the chambers judge noted that the Master had upheld the validity of the caveat. The chambers judge did not assess the validity of the Master's reasons, offering no conclusions in respect of the decision the Master made. Instead, the chambers judge dismissed the Condo Corp's application on the basis that the issues it raised had already been heard and decided in the summary judgment applications heard by him in both January 2007 and August 2007. Consequently, the chambers judge maintained his earlier dispositions that there would have to be a trial of an issue.

II. Analysis

[24] On appeal, the Condo Corp's arguments seem to focus on who has the authority to determine the amount of the special levy it imposed on the condominium unit owned by Fantasy. However, the authority of a condominium corporation to set the amount of a special levy is not in dispute. What is in dispute is the quantum of the damages allegedly owing by Fantasy to the Condo Corp by reason of the identified deficiencies. The arguments of the Condo Corp do not address the reasons for the chambers judge's decision declining to dismiss the appeal from the Master's order.

[25] Fantasy's position is that the Condo Corp was procedurally and legally barred from seeking any summary relief at the September 2008 hearing because of the chambers judge's prior decisions. It contends that the Condo Corp was obliged to proceed to trial.

[26] It is not clear on this record whether the chambers judge actually came to any conclusions regarding the Condo Corp's efforts to dismiss Fantasy's appeal of the Master's order either on its merits or for want of prosecution. What is clear, though, is that the chambers judge did, in August 2007, hear submissions on this issue according to the clerk's notes. He then went on to set timelines for the trial of an issue, inferentially rejecting therefore, the Condo Corp's efforts to have Fantasy's outstanding appeal from the Master's order dismissed. As noted, the Condo Corp did not appeal the chambers judge's August 2007 decision.

[27] This being so, and the chambers judge having already adjudicated on the Condo Corp's attempts to have Fantasy's appeal dismissed, the Condo Corp cannot now seek to have the appeal dismissed in the face of the outstanding decisions, not appealed, that there be a trial of an issue.

[28] Assuming for the sake of argument that this were not so, the issue would then be whether Fantasy's outstanding appeal of the Master's decision upholding the validity of the Condo Corp's s. 39 caveat ought to be dismissed for want of prosecution or on its merits.

[29] On the issue of dismissal for want of prosecution, it is apparent that Fantasy intends to pursue the appeal and that any delays since it filed the appeal in August 2006 are attributable in considerable part to the Condo Corp's efforts to focus on its alternative remedies under s. 67 of the *Act*, which Fantasy has actively defended. We also note that we have no evidence of any prejudice to the Condo Corp flowing from any delay by Fantasy in pursuing the subject appeal. Indeed, no such argument is even raised in the Condo Corp's factum on this appeal. Accordingly, there is no reasonable basis on which to dismiss the appeal for want of prosecution.

[30] With respect to the merits of the Master's decision, the central issue is this. Did the Master make any reviewable error in determining that the subject Caveat was valid and enforceable based on the evidence before him?

[31] It is clear from his reasons that the Master reached three conclusions. First, he determined that it is open to a condominium corporation to levy a special levy only against a developer as owner

of a unit in condominium project for monies owing by the developer to the condominium corporation as a developer of the project. Second, in the context of this case, the Master concluded that the Condo Corp's s. 39 caveat was valid and enforceable based on what he concluded "appears to be misconduct" of Fantasy as developer. Third, the Master acknowledged that there "remain outstanding issues between the parties which may affect the ultimate liability of Fantasy".

[32] For purposes of this appeal, it is not necessary for us to determine whether the right to levy a charge against a condominium unit on other than a proportionate basis can be invoked as here against one owner's unit only when the charge is not related to the owner's ownership of the condominium unit, but arises instead out of some independent cause of action that the condominium corporation may have against the owner based on the owner's status and obligations as developer of the condominium project. The answer to this question raises serious issues of statutory interpretation and policy which we decline to determine at this time. Those policy issues include what effect the Master's interpretation of s. 39(1)(c) of the *Act* would have on (a) the rights of secured third parties holding interests in the affected condominium unit; (b) the ability of owners of condominium units to secure financing to permit them to purchase those units; (c) the availability of legislative exemptions granted to citizens on debts owed by them; and (d) the limits, if any, that should apply to a regime that permits a condominium corporation to set quantum of amounts owing by unit holders and to enforce payment in priority to the interests of secured creditors and others. Of course, in the end, the question to be answered is whether the Legislature intended that a regime of disproportionate allocation of levies apply to cases such as this.

[33] Leaving this significant issue aside for the moment, the fatal flaw in the Master's reasons is his finding that there "appears to be misconduct" of Fantasy as a developer. But an "appearance" of misconduct alone is not sufficient to attach liability to Fantasy for purposes of validating its s. 39 caveat. Even assuming, without deciding, that the amount a developer owed to a condominium corporation by reason of its misconduct could be levied against only the unit or units owned by the developer, at a minimum, a finding of misconduct by Fantasy, as opposed to an appearance of misconduct, would be required as a condition precedent to a finding that the caveat was "valid". The Master did not make such a finding.

[34] In fact, the Master expressly acknowledged that "there remain outstanding issues between the parties which may affect the ultimate liability of Fantasy", one of these items clearly being the cost to rectify the construction deficiencies. This is evident from para. 1 of his reasons:

> ... The Condominium Corporation has established the cost to rectify the deficiencies at $82,000.00. Fantasy has disputed the amount needed to rectify the deficiencies, whether some of the alleged deficiencies were to be part of the construction at all, and complains that it is prepared to rectify the deficiencies but has been precluded from entering upon the lands to do so. These other matters form part of a larger action between the parties. ...

[35] Further, it is evident that the Master was basing his statement that there "appears to be misconduct" on an assessment of Fantasy's alleged misconduct under s. 67 of the *Act*. However, in the subsequent proceedings pursued by the Condo Corp specifically under s. 67 of the *Act*, the chambers judge ordered a trial of an issue relating to those allegations of misconduct. That being so, this too undermines the Master's decision to validate the caveat in the absence of any agreement or any finding on quantum, much less liability.

[36] All this being so, we have concluded that the chambers judge's decision to order this matter on to trial was correct but not for the reasons he articulated.

[37] We therefore dismiss the Condo Corp's appeal and direct that this matter proceed to trial. This matter should be referred back to a case management judge to set new deadlines for trial of the issue(s). Since the chambers judge, as case management judge, has been burdened with this matter for some time now, it is not fair to continue to impose this burden on him and we remit it to another Queen's Bench justice for case management. The parties are directed to appear before Associate Chief Justice Rooke for appointment of a case management judge. The funds held in trust in court will remain in court until conclusion of this action.

[38] Given that Fantasy acknowledges that it has no assets aside from its claim to the money being held in court in this action, we direct it to post costs in the sum of $40,000 within 60 days of the date of this judgment. If the costs are not posted within that time, the Clerk of the Court of Queen's Bench shall pay out the remainder of the money held in court to the Condo Corp, who, upon receipt of those funds, has agreed it will discontinue its proceedings against Fantasy and we so order.

Appeal heard on January 26, 2010

Memorandum filed at Edmonton, Alberta
this 5th day of February, 2010

Fraser C.J.A.

Ritter J.A.

Authorized to sign for: Martin J.A.

Appearances:

C. Long
for the Appellant (Applicant)

B.I. Dagenais
for the Respondent (Respondent)