

Court of Queen's Bench of Alberta

Citation: Condominium Plan No. 772 0093 v. Rathbone, 2010 ABQB 69

Date: 20100129
Docket: 0903 05768
Registry: Edmonton

Between:

The Owners: Condominium Plan No. 772 0093 (Clareview Village Condominium Corporation)

Applicant

- and -

Eileen Rathbone

Respondent

**Memorandum of Decision
of
L.A. Smart, Master in Chambers**

I. Nature of the Application

[1] The Owners: Condominium Plan No. 772 0093 (the "Condominium Corporation") ask for solicitor-client costs of the application brought by it against Ms. Rathbone in which it sought access to her condominium unit in order to inspect and replace her unit windows.

II. Discussion

[2] Ms. Rathbone is the owner of a condominium unit in the Clareview Village Condominium complex.

[3] On April 21, 2009, the Condominium Corporation filed an originating notice seeking a declaration pursuant to s. 67 of the *Condominium Property Act*, R.S.A. 2000, c. C-22 (the "Act") that its bylaws were binding on Ms. Rathbone; directing that she abide in particular by the bylaw requiring that she allow the Condominium Corporation or its agent access to her unit and the adjacent common property to inspect, remove and replace the windows of her unit; granting the Condominium Corporation or its agent entry to the unit if entry was refused by Ms. Rathbone and permitting reasonable force to be used for that purpose; directing that Ms. Rathbone not use her unit basement as a bedroom; and directing that she pay all costs the Condominium Corporation had been put to in gaining access to the unit, including legal fees on a solicitor-client indemnity basis.

[4] Section 67(2) of the Act provides that on an application by an interested party, if the Court is satisfied that improper conduct has taken place, the Court may direct that the person carrying on the improper conduct cease doing so, award compensation to the applicant if the applicant suffered loss due to the improper conduct, and award costs.

[5] In support of this application, the Condominium Corporation filed the affidavit of its president, Angie Smith, sworn April 20, 2009.

[6] Ms. Smith deposed that, pursuant to what is now s. 32 of the Act, the Condominium Corporation filed bylaws with the Land Titles Office on January 31, 1977 and that these bylaws regulate the Condominium Corporation's affairs.

[7] The bylaws, which act as a contract between the owners and the Condominium Corporation, provide that the Condominium Corporation or its agent may have access to the units for purposes of maintaining, repairing or renewing the common property and to ensure the bylaws are being observed. They also provide that units and the common property are not to be used in an illegal or injurious fashion or in a way that will cause a nuisance or hazard to an occupier. The bylaws specify that the owners are to comply with the bylaws and cause their tenants and visitors to do so. They require that the owners not allow anything to be done which will increase the rate of fire insurance or conflict with fire-related laws or regulations and not permit anything to be done which is contrary to any municipal bylaw or that is injurious to health.

[8] Ms. Smith further deposed that in the spring of 2008 and again in the fall of that year, the Condominium Corporation sent notices to all owners alerting them to a window replacement program. The notices indicated that provincial codes and regulations did not allow for bedrooms in the basement of any unit.

[9] Attached as exhibits to Ms. Smith's affidavit were letters dated May 27, 2008, July 6, 2008 and October 21, 2008 by Ms. Rathbone responding to the notices and making it clear that she did not intend to cooperate in allowing the Condominium Corporation to replace the windows of her unit.

[10] The Condominium Corporation had its counsel write to Ms. Rathbone and she responded. Subsequently, she inquired of the Condominium Corporation as to the size of window necessary to allow for a basement bedroom.

[11] On April 1, 2009, the Condominium Corporation asked Mr. Rathbone for access to her unit. She refused to allow access at the time proposed.

[12] Ms. Rathbone, who was 71 years old at the time, swore an affidavit, dated June 1, 2009, in support of her position on the application. She deposed that she was the sole occupant of a three bedroom condominium unit with an undeveloped basement. She indicated that on May 1, 2007 she was assessed a special levy of \$5,500.00 to refurbish the windows of her unit, which she paid. She further stated that on May 21, 2008 she received a special notice from the Condominium Corporation indicating that the engineering firm overseeing the window replacement program would be making inspections during installation in each unit. Ms. Rathbone deposed that the notice contained “a gratuitous and wholly inaccurate inference that I was harbouring a basement suite in my unit.” She stated that Ms. Smith and others inspected her premises on May 5, 2009.

[13] By way of supplemental affidavit, Ms. Smith responded that given the history of the dealings between the Condominium Corporation and Ms. Rathbone in relation to the window replacement program, she remained concerned that Ms. Rathbone would refuse access to the contractor when the time came to replace her windows.

[14] On June 1, 2009, I granted the order requested by the Condominium Corporation, but reserved on the issue of whether legal costs on a solicitor-client indemnity basis should be granted, pending a review of the bylaws. According to the bill of costs presented, legal costs on a solicitor-client basis as of June 11, 2009 amounted to \$8,009.28.

[15] In *Maverick Equities Inc. v. Condominium Plan No. 942 2336*, 2008 ABCA 221, which involved an appeal from a decision of the chambers judge relating to whether certain behaviour of the unit owner was improper conduct for purposes of s. 67 of the Act, the Court of Appeal granted solicitor-client costs of the appeal, but such costs were provided for in the bylaws.

[16] Solicitor-client costs have been awarded in certain other cases dealing with s. 67 of the Act, but largely without comment as to whether the bylaws provided for such.

[17] In *934859 Alberta Inc. v. Condominium Corporation*, 2007 ABQB 640, 434 A.R. 41, Chrumka J. heard an appeal by a condominium corporation from a Master's order granted on a s. 67 application in favour of the applicant unit owner. The appeal was allowed and the corporation was granted party-party costs against the unit owner.

[18] In *Devlin v. Condominium Plan No. 9612647*, 2002 ABQB 358, 318 A.R. 386, the applicant unit owner sought a declaration that a restrictive covenant against leasing the

condominium units was void. He was successful and asked for solicitor-client costs. No mention was made as to whether the bylaws allowed for such costs. Power J. pointed out (at para. 28) that costs are in the discretion of the Court under the Alberta *Rules of Court*, but that discretion is limited by judicial propriety. While he acknowledged that he had the discretion to order solicitor/client costs in a proper case, he was of the view that the matter before him was not such a case. In the end result, he ordered party-party costs.

[19] I have reviewed the bylaws of the Condominium Corporation in the present case and they do not provide for solicitor-client costs.

[20] The Condominium Corporation relies on ss. 39 and 42 of the *Condominium Property Act*. Section 39 relates to the power of the corporation to establish a fund for administration expenses and for the levying of contributions on the owners in order to raise those funds. Section 42 provides that where the corporation takes steps to collect any amount owing under s. 39, it may recover all reasonable costs, including legal expenses and interest incurred in collecting the amount owing from the person against whom the steps were taken .

[21] In my view, those sections of the Act do not apply to the present situation as the Condominium Corporation has not established that there is money owing from Ms. Rathbone pursuant to s. 39 and it has not take steps to collect any such amount.

[22] As noted by Power J. in *Devlin*, costs are in the discretion of the Court. Unless provided for by contract or statute, solicitor-client costs are awarded only in specific circumstances, none of which exist here. Accordingly, the Condominium Corporation is granted party-party costs under the *Rules of Court*.

Heard on the June 1, 2009.

Dated at the City of Edmonton, Alberta this 29st day of January, 2010.

L.A. Smart
M.C.C.Q.B.A.

Appearances:

Donald Kramer, Q.C.
Melnik & Company
for the Applicant

J.R. Nickerson, Q.C.
Nickerson Roberts Holinski & Mercer
for the Respondent