Court of Queen's Bench of Alberta

Citation: Givens v. Paulmac Developments Ltd., 2012 ABQB 75

Date: 20120127
Docket: 0903 07563
Registry: Edmonton

Between:

Anne Elizabeth Givens and James Clayton Givens

Plaintiffs

- and -

Paulmac Developments Ltd., Eagle Point At Country Club Ltd. and Condominium Corporation No. 0421426

Defendants

Memorandum of Decision
of
W. Breitkreuz, Master in Chambers

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[1] This is an application by the defendant Condominium Corporation No. 042 1426 for an order setting aside the noting in default. All future references to the defendant will mean the condo corporation defendant.

[2] I will mention at the outset that the counsel appearing for the defendant at this application is not with the firm who represented the defendant when the noting in default first came to the attention of prior counsel.

[3] The statement of claim was issued on May 22, 2009, and served on the defendant's property manager administrator personally on June 16, 2009. No exception is taken to the effectiveness of the service. The property manager administrator was served personally at the registered office of the defendant Condo Corporation.

[4] The defendant was noted in default on July 7, 2009. It seems that the statement of claim wasn't brought to the attention of the defendant board until November 11, 2009. The administrator has not presented any evidence about that 5 month gap, and no one has ever tendered any explanation about that 5 month gap.

[5] What was done after the defendant board learned about the proceedings against the defendant, the steps taken were only slightly more positive than prior to notice of the proceedings. The defendant's prior counsel tried to obtain a consent from plaintiff's counsel for an order setting aside the noting in default but that was unsuccessful. An application was then filed together with an affidavit of the then president of the board, one Ms. Schnitzler. The plaintiff's counsel then arranged for examination on affidavit of that affidavit which was adjourned three times at the request of the defendant's prior counsel, and that cross examination never took place.

[6] Minutes of the meetings of the board were presented in evidence as answers to undertakings and of the numerous monthly meetings which took place since the board had notice of the proceedings only one meeting, the one on Thursday, April 28, 2011 refers to these proceedings in paragraph 2 as follows:

> 2. Special Guest: Robert Noce
>
> Robert Noce, a lawyer with Miller West, (sic) was introduced to the board. He will be replacing [previous lawyer]. Sue reviewed the Givens file for Robert.

[7] The last letter from the plaintiff's counsel to the defendant's prior counsel was sent in December, 2010. No response was ever received to that letter.

[8] Shortly after that the defendant retained the counsel who is currently representing it. Whatever delay occurred once Mr. Noce was retained, in my opinion, is attributable to the board's own lack of action, rather than anything that can be attributed to Mr. Noce.

[9] The defendant board seems to have a pattern of doing nothing when faced with serious issues. On June 3, 2010 the City of Edmonton issued an order under the *Safety Codes Act* in relation to the problem which is the subject matter of this lawsuit. There isn't a single reference to that Safety Order in any of the minutes of the meetings of the board, and in fact, the President of the board was not aware of that order until he was briefed by Mr. Noce for the cross examination on his affidavit in September, 2011. In addition, a defence raised by the defendant in its proposed defence is that the by-law passed by the board in 2006 in which it assumed responsibility for correcting the defective construction in the retaining wall which is part of the plaintiff's unit is *ultra vires* of the Condominium Corporation. As of the date of the application nothing has been done to reverse that by-law alleged to be *ultra vires*, and there is no reference at all to that in any of the minutes of the meetings produced as answers to undertakings.

[10] There are numerous cases that deal with the traditional three prong test to be applied in an application to set aside a noting in default. There is a further general test that removes some of the rigidity of the three prong test, which was first articulated by Madam Justice Veit in the ***Don Reid Upholstery*** case, cited in counsels' briefs. That more equitable articulation of the test to be applied is that the three prong test is simply a guideline to assist the court in determining what is fair in the circumstances. The case is reported at (1984) 32 Alta. L.R. (3d) 281.

[11] In my opinion it would be unfair and unjust and an improper exercise of my discretion to allow the defendants to file a defence in these circumstances. I am not convinced that the reason for not filing a defence is satisfactory, nor is the delay between the time of the noting in default and the date of the application excusable.

[12] The argument as to whether the proposed statement of defence raised a meritorious defence will have to await another day.

[13] The application to set aside the noting in default is dismissed with costs to the plaintiff against the Condominium Corporation defendant.

Heard on the 26th day of September, 2011.

Dated at the City of Edmonton, Alberta this 27th day of January, 2012.

W. Breitkreuz
M.C.C.Q.B.A.

Appearances:

Dawn Pentelechuk,Q.C.
Cleall LLP
for the Plaintiffs

Roberto Noce, Q.C.
Miller Thomson LLP
for the Defendant, Condominium Corporation No, 042 1426

Crista Osualdini
McLennan Ross LLP
for the Defendants, Paulmac Developments Ltd., Eagle Point at Country Club Ltd.