Court of Queen's Bench of Alberta

Citation: Condominium Corporation No. 042 5636 v. Chevillard, 2012 ABQB 131

Date: 20120227
Docket: 1003 18687
Registry: Edmonton

Between:

Condominium Corporation No 042 5636

Applicant

- and -

Ralph Chevillard

Respondent

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

I Background

[1] Condominium Corporation No. 042 5636 (the "Condo Corp.") has brought an application by way of Originating Notice for judgment against the Respondent Ralph Chevillard ("Chevillard") in amount of $150 for unpaid fines alleged to be due to the Condo Corp., removal of a dog from the complex and costs on a solicitor-client basis. The Estates of Clarview is a condominium complex in Edmonton consisting of three four-story buildings containing 380 residential units. Candema Consultants (Realty) Inc. ("Candema") has been retained by the Condo Corp. as its property manager.

[2] Legal unit 276 of the complex was registered in the name of Chevillard in March, 2008. Chevillard resides in the unit with his two grandchildren. His granddaughter Skyler purchased a pup and brought it to the unit some time shortly before early November 2009, and that is when

this trouble began. The Condo Corp. received a complaint from another owner of a unit that the dog defecated on common property. A letter was written by Candema on November 5, 2009 advising Chevillard that the dog had defecated on common property and that the feces were to be removed immediately. Alternatively, the work would be done and costs incurred bill back to him. It contained a warning that further breaches would result in fines and/or the removal of the pet. Although the reference line in the letter mentions Chevillard's balcony, there is no specific reference to that being the subject common property in the letter. The letter stated that Board approval must be obtained before bringing a pet into the building and that it was necessary to complete and return the "Pet Application Form" to the office. It also attached a copy of the Condo Corp.'s Pet Policy along with information from the bylaws concerning pets.

[3] On February 17, 2010, Candema and the Board received a written complaint from another owner advising the dog at the Chevillard unit had defecated on the common property balcony and it had not been picked up. On February 18th, 2010 Candema again wrote Chevillard advising of the contravention of the bylaws attaching copies of the relevant sections concerning pets and balconies. He was told to remove the feces within 10 days or it would be done and any costs incurred billed back to him. A fine of $50 was assessed and a warning issued that subsequent offenses would result in a fine of $100 and the possibility of notice to remove the dog from the premises. Again the letter stated that Board approval was required prior to bringing the pet on the property and that the attached application form must be submitted within 10 days, or alternatively, he would be asked to remove the pet from the premises. No charges are claimed so presumably Chevillard did the cleanup in each of the first two instances although there is no direct evidence on this point.

[4] On June 20, 2010 a complaint was received from another owner, this time advising that the dog had defecated in the front lobby and that it had been cleaned up by another unit owner. On June 21, 2010 Candema sent a notice to Chevillard fining him the amount of $100 for this further violation. Candema also gave notice that any further violations would result in the possibility of a notice to remove the dog from the Unit. For a third time a request was made to complete the Pet Application Form with a warning that if it was not received within 10 days that Chevillard would be asked to remove the dog from the Unit.

[5] On September 7, 2010 the Board resolved "that the pet (dog) in Unit 276 be removed for the breach of Bylaws 31 and 32 and Policies of the Condominium Corporation." A copy of the resolution was sent by Candema to Chevillard requesting arrangements be made to have the pet removed on or before September 30, 2010. The pet was not removed. Legal counsel by letter dated October 12, 2010 served notice that the dog was to be removed within 10 days and satisfactory evidence provided to them failing which an application would be brought before a Master in the Court of Queen's Bench for an order to remove the dog. In addition it advised that if the application was necessary they were instructed to seek to hold Chevillard responsible for all costs incurred by the Condo Corp. on a solicitor and his/her own client basis.

[6] Despite the demand no evidence was provided to legal counsel, Candema or the Board confirming the dog had been removed and as a consequence the Originating Notice was filed on

October 29, 2010 returnable November 10, 2010. The affidavit of service indicates that the Originating Notice was served on an adult female at the Unit. On November 1, 2010 Chevillard's then 17-year-old granddaughter Skyler (the "adult" served) contacted the law firm advising that she lived in the Unit and that the dog had been removed on or before October 22, 2010. She also provided her e-mail address. On November 2, 2010 the law firm wrote to Skyler by e-mail advising that the Board required a written e-mail confirmation of the date the dog was permanently removed and where it was relocated together with written confirmation that the fine and legal costs incurred to date would be paid. Counsel also advised that an agreement on this payment would have to be reached before steps could be taken to stop the application and warned that if no agreement were reached legal costs would increase considerably. Skyler contacted legal counsel on November 4 and November 8, 2010 indicating she had received the e-mail and had to discuss the agreement with Chevillard. After a telephone conversation on November 8, 2010 Counsel again wrote by e-mail indicating that an agreement with regard to payment of the fine and costs would have to be reached before the scheduled court date otherwise it would proceed. Skyler did not contact legal counsel, Candema or the Board before hearing of the application on November 10, 2010.

[7] On November 10, 2010 Chevillard appeared and was granted an adjournment to December 1, 2010 to permit him to file Affidavit evidence. On December 1, 2010 the matter was further adjourned to February 4, 2011 and a deadline set for the conduct of Questioning on the Chevillard Affidavit and filing of Supplementary Affidavit evidence. Questioning on the Affidavit took place on January 7, 2011. Chevillard filed an additional Affidavit on January 21, 2011. On February 4, 2011 the matter was adjourned to a Masters's Special Chambers on May 2, 2011.

[8] The Affidavit of Chevillard, confirmed in questioning, evidences that the offending dog was removed from the premises on or before October 22, 2010. As a consequence there was no necessity for the court to deal with an Order to remove the dog but the matter of the fines and costs were in issue.

The Act, Bylaws And Pet Policy

[9] It is useful to set out the relevant provisions of the Condominium Property Act, RSA 2000,c. C – 22 and the Bylaws of the Condo Corp.

[10] The subsections of Section 32 of the Act that are applicable are as follows:

> Bylaws
> 32(1) The bylaws shall regulate the corporation and provide for the control, management and administration of the units, the real and personal property of the corporation and the common property.
>
> (2) The owners of the units and anyone in possession of a unit are bound by the bylaws.

(3) Any bylaw may be amended, repealed or replaced by a special resolution.

(4) An amendment, repeal or replacement of a bylaw does not take effect until

(a) the corporation files a copy of it with the Registrar, and

(b) the Registrar has made a memorandum of the filing on the condominium plan.

.....

(6) The bylaws bind the corporation and the owners to the same extent as if the bylaws had been signed and sealed by the corporation and by each owner and contained covenants on the part of each owner with every other owner and with the corporation to observe and perform all the provisions of the bylaws.

(7) If there is a conflict between the bylaws and this Act, this Act prevails.

[11] Sanctions for failure to comply with bylaws and enforcement of the sanctions are dealt with in sections 35 and 36 of the Act, the applicable subsections are as follows:

35(1) The corporation may by bylaw impose monetary or other sanctions on owners, tenants and invitees of the owners or tenants who fail to comply with the bylaws.

(2) A bylaw under which sanctions are imposed must

(a) set out the sanctions that may be imposed, and

(b) in the case of monetary sanctions, set out the amount of the monetary sanctions or the range of monetary sanctions that may be imposed.

(3) A bylaw under which sanctions may be imposed may be general or specific in its application.

....

(5) Where a person fails to abide by a sanction or to pay to the corporation a monetary sanction imposed under a bylaw, the corporation may proceed under section 36 to enforce the sanction.

Enforcement of sanctions

36(1) If a person fails to comply with a sanction or to pay a monetary sanction imposed pursuant to a bylaw, the corporation may, in respect of the contravention,

(a) take proceedings under Part 4 of the *Provincial Court Act* to recover from the person

(i) a monetary sanction, or

(ii) damages, in the case of any other sanction

in an amount not exceeding the amount that may be granted in damages under the *Provincial Court Act*, or

(b) take proceedings in the Court of Queen's Bench to recover from the person

(i) a monetary sanction of not more than $10,000, or

(ii) damages of not more than $10,000, in the case of any other sanction.

(2) In an action under subsection (1), the corporation must establish to the satisfaction of the court hearing the matter that

(a) the bylaws relating to the matter before the court were properly enacted, and

(b) the bylaw for which the sanction was imposed was contravened by the defendant.

(3) On hearing the matter, the court may do one or more of the following:

(a) give judgment against the defendant in the amount being sued for or any lesser amount as appears appropriate in the circumstances;

(b) in the case of proceedings taken in the Court of Queen's Bench, grant injunctive or other relief that the Court considers appropriate in the circumstances;

(c dismiss the action;

(d) make an award as to costs as appears appropriate in the circumstances.

(4) For the purposes of an action commenced under subsection (1)(a)(ii) or (b)(ii), once the court is satisfied that the requirements of subsection (2) have been met, damages are deemed to have been suffered by the corporation.

(5) Where a corporation takes proceedings under this section, it is entitled to claim from the defendant the corporation's legal expenses incurred in respect of the proceedings.

[12] The bylaws relevant to this matter are as follows:

4. Powers of the Corporation

The Corporation has all the powers it requires in order to carry out its duties. For example, the Corporation may:

g) levy fines, not exceeding $200.00 per infraction, for the contravention of any by-law;

i) adopt policies and/or rules concerning various matters of common concern to the occupants, such as:

i) the rental of units to tenants. Such rules may include the imposition of damage deposits, a requirement that tenants sign an undertaking to be bond by the by-laws, procedures for giving tenants notice to vacate, and any other rules which the Corporation could reasonably make to protect the lifestyle of occupants in the development;

ii) use of various common areas such as the lobby areas, elevators, corridors, etc.

iii) occupants' use of the balconies attached to their suites;

iv) changes to units which have a significant impact on occupants of other suites;

14. **Powers of the Board**

Generally, the Board has all the powers it reasonably requires to carry out its duties. More specifically, the Board's powers include:

d) establishing policies concerning various issues. All such policies shall have the force of a bylaw, as long as the policy respects the spirit of these bylaws;

17. **Penalties for By-Law Contravention**

17.1 If the Board determines that a breach of a by-law is occurring, it may, by resolution, cause a notice to be delivered to the owner alleged to be in breach. The notice shall specify the nature and particulars of the breach, as well as a reasonable time within which the breach is to be rectified. The time specified shall be no earlier than three (3) days from the date the notice is delivered to the owner involved.

17.2 If the resolution so provides, the Board may impose a fine, not exceeding $200.00 per infraction, which will be levied if the breach has not been rectified within the time specified in the notice. If the Board intends to levy a fine, the notice alleging the breach shall include a notice to that effect.

31. **Animals**

Occupants are allowed to keep one or more pets in their apartment homes as long as the following conditions are met:

a) the animal must not be allowed to run at large (i.e. not on a leash) within the development.

b) The owner of the pet is responsible for picking up and disposing of any droppings left by the pet;

c) In general, the owner of the pet shall ensure that the pet does not unreasonably interfere with the rights of the other occupants. The Board has the authority to make a final determination in this respect.

32. **Balconies**

32.1 Each occupant has a right to exclusive use and possession of the balcony attached to his Apartment Home;

32.2 The Board is entitled to adopt reasonable rules concerning occupants' use of their balconies, including:

a) rules dealing with the general appearance of balconies;

b) rules dealing with activities which are likely to affect neighbouring owners (barbecues, amplified music, satellite dishes, christmas lights, etc.);

c) rules concerning the enclosure of balconies;

37. **Assessment of Condominium Fees**

37.1 The Board may assess condominium fees on any of the following bases:

b) Any expenses which the corporation incurs (repair costs, insurance deductibles, legal fees, etc.) because of the actions of an occupant of a unit may be charged to the owner of that unit;

[13] In addition the Condo Corp. have developed a number of policies one of which I have referred to as the Pet Policy which reads as follows:

> Board approval must be obtained PRIOR to bringing a pet into the building and a pet registration form must be completed. No pets are allowed on the property prior to being approved by the board. Any pets not registered with the board of directors may be required to vacate the property and the resident may be charged a one hundred dollars ($100) penalty for non compliance. Forms may be obtained from the property management office. Breeds of dogs on the City of Edmonton restricted lists will **NOT** be allowed on Estates of Clareview premises. Pet applications that are not approved are not subject to appeal. Pets must be licensed with the City of Edmonton and up to date on all vaccinations as required by city bylaws.

II Discussion

[14] Condominium Corporations are created by the Act and those corporations must derive their powers from that statute. They do not enjoy the same powers of a natural person as bestowed upon corporations under the *Business Corporations Act*, RSA 2000, c. B-9 (***Francis v. Condominium Plan No. 822-2909***, 2003 ABCA 234).

[15] The Condo Corp. repealed the statutory bylaws in the Act and replaced them by special resolution on October 13, 2004, and registered on October 14, 2004 at the Land Titles Office. There is no dispute that the bylaws in evidence are the bylaws of the Condo Corp. Section 32 (7) of the Act specifically provides that in the event there is a conflict between the bylaws and the Act, the Act will prevail.

[16] Section 32 (3) of the Act provides the bylaws may be amended, repealed or replaced by a special resolution. Article 14 d) of the Bylaws provides that the Board may establish policies and further that such policies shall have the force of a bylaw. The establishment of policies and rules for use by Boards of Condominium Corporations was addressed in ***Maverick Equities Inc. v. Owners: Condominium Plan 942-2336***, 2008 ABCA 221. The Court of Appeal in their decision observed that there were advantages to the writing down Rules and Regulations so that unit owners have a clear idea of what is expected of them and that there is nothing in the Act which

prohibits the establishment of guidelines for the granting of consent by a Board. However, a Board of the Condominium Corporation cannot establish policies, rules or guidelines that contradict or have the effect of amending an existing bylaw. Clearly that must be done through an amendment to the bylaws despite language in the bylaws which purport to give policies the force of a bylaw.

[17] The bylaws in this case expressly contemplate that the Board may adopt policies and/or rules concerning various matters of common concern to the occupants and specifically with respect to occupants use of the balconies attached to their suites. Article 31 states that occupants are allowed to keep one or more pets as long as certain conditions are met, specifically, the animal must not be permitted to run at large, droppings will be picked up and, in general, the occupant must ensure that the pet does not unreasonably interfere with the rights of other occupants. The Board has authority to make a final determination in respect of unreasonable interference with the rights of others. The pet policy requires the completion of a registration form prior to a pet being brought into the building and requires board approval. It also restricts the breeds, size of dog, requires city permits and licensing, and restricts the number of pets to two. Finally it states that pets that are not registered with the Board may be required to vacate and a resident may be charged $100 penalty for noncompliance. The conditions and constraints imposed although laudable and no doubt desirable have the effect of fettering the rights of an owner given under Article 31 of the Bylaws. In my view the requirement of Board approval and the further restrictions imposed including the imposition of a penalty by policy exceeds the capacity of the Board, that is to say, the policy is *ultra vires* the Act. An amendment to the Bylaws would be required which must be done by special resolution in accordance with the Act.

[18] When it is determined that a breach of a bylaw is occurring, Article 17 provides that the Board may by resolution cause a notice to be delivered to the owner specifying the nature and particulars of the breach as well as a reasonable time within which to rectify it. If the resolution provides the Board may impose a fine not exceeding $200 per infraction which will be levied if the breach has not been rectified within the time specified in the notice. If a fine is to be levied the notice alleging the breach must include a notice to that effect. By correspondence dated February 18th 2010 and June 20, 2010, Candema (on behalf of the Board) advised Chevillard of the breach of the bylaw and purported to impose a fine without the opportunity to rectify the breach. There is no mention of a resolution by the Board nor are there resolutions in evidence.

[19] On September 7, 2010, the Board resolved that the pet must be removed for breach of Article 31 and 32 and Policies of the Condominium Corporation. A copy of that resolution was sent to Chevillard. The resolution lacks any particularity with respect to the breaches and provides no opportunity for rectification of the breaches as required under Article 17. Furthermore, it relies on “Policies” which presumably is the Pet Policy referred to above which I have determined to be *ultra vires* the Board. With respect to Article 32 regarding balconies, it provides for exclusive use of the balcony attached to a unit by an owner and permits the Board to adopt reasonable rules concerning use of the balconies. No rules with respect to balconies have been placed in evidence nor is there any mention of rules in relation to balconies, at all. This leaves Article 31 but without any particularity it is impossible to determine the nature of the

breach. It may be that the dog has been allowed to run at large; there's been a failure to pick up droppings; or it has otherwise been determined that the dog had unreasonably interfered with the rights of other Owners. One is also left to wonder whether the breaches pertain to the earlier events for which correspondence had been sent or if there has been a further breach or breaches since then.

III Conclusions

[20] As noted the dog had been removed but the application proceeded to deal with the collection of fines and costs. This matter may be brought in the Court of Queen's Bench under section 36 (1) (b) of the Act as the fine is below $10,000. Parenthetically, I observe that this appears to be a drafting error as the combined effect of section 36 (1) (a) and (b) is to eliminate the jurisdiction of both the Provincial Court and Court of Queen's Bench under this section in the event the amount of the fines or damages exceed the statutory limit of the Provincial Court. Regardless, it appears the Provincial Court jurisdiction is limited to awarding of monetary judgments for fines and damages as authority to provide injunctive or other appropriate relief is granted only to the Court of Queen's Bench by section 36 (3) (b).

a) Fines

[21] Having established that the bylaws were properly enacted, the Condo Corp. must establish to the satisfaction of the court that the bylaw for which the sanction was imposed was contravened. Despite my conclusion with respect to the Pet Policy, Article 17 of the Condo Corp.'s bylaws authorizes the assessment of fines for breach of a bylaw and the evidence in this case supports the breach of Article 31 (b) for failure to pick up and dispose of pet droppings. *Prima facie* the requirements of Section 36 have been established, however, Article 17 of the bylaws requires a resolution of the Board to cause notice of the breach be delivered which shall specify the nature and particulars of the breach as well as a reasonable time to rectify the breach. The fine if prescribed only comes into effect if the breach has not been rectified. There are no resolutions in evidence with respect to the fines. One might reasonably conclude that the notices having been sent on behalf of the Board are in fact supported by resolution. Regardless the fines, in this case are simply imposed without an opportunity to rectify the breach nor is there any evidence to support the failure to rectify the breaches in any event. Having regard to the foregoing, the necessary prerequisites for imposition of the fine were not met. The application for judgment for the $150 in fines is denied.

b) Costs

[22] The Condo Corp. claims costs for having to prepare, file and serve the Originating Notice and Affidavit together with subsequent cost for appearances, questioning and related activities on a solicitor-client basis. Section 36 (3) (d) of the Act provides that the Court may make an award of costs as appears appropriate in the circumstances and Section 36 (5) provides that the Condo Corp. is "entitled to claim its legal expenses incurred in respect of the proceedings". The Condo Corp. takes the position that the language of the section entitles it to receive solicitor-

client costs. I am inclined to agree that the language supports the argument for costs on a solicitor-client basis. Section 42(a) of the Act deals with the costs when a Condo Corp. take steps to collect an amount owing under Section 39. That section provides that the Corporation may "recover from the person against whom the steps were taken all reasonable costs, including legal expenses and interest, incurred by the Corporation in collecting the amount owing..." in contradistinction to the language in Section 36(5) in which the Corporation is "entitled to claim" legal expenses.

[23] Having regard to the differing language in the subsections and that costs are generally discretionary, although the Act permits a claim for legal expenses it remains subject to the ultimate discretion of the court specifically preserved by Section 36 (3) (d) to award costs as appear appropriate in the circumstances.

[24] The Condo Corp. also relies on Article 37.1 (b) which states that the Condo Corp. may assess condominium fees for any expenses incurred including legal fees because of the actions of an occupant and charged to the owner of that unit. Article 37 refers to Condominium Fees. This term cannot be found in the Act but is meant to refer to contributions from owners for purposes of Section 39 of the Act to establish a fund for administrative expenses sufficient for the control, management and administration of the common property, payment of premiums of insurance and for the discharge of any other obligation of the Corporation. That section does not refer to costs incurred for recovery of fines or steps otherwise taken under Section 36. In my view if this Article is attempting to characterize such amounts as part of an assessment it is *ultra vires* the provisions of the Act. I reach this conclusion cognizant of the provision which permits a Condo Corp. the ability to recover assessments other than on the basis of unit factors. Costs in these circumstances cannot be levied as a contribution, however, if my conclusion is incorrect it is neither alleged nor is there evidence that these costs were assessed as a contribution.

[25] Regardless the Condo Corp. faces far more serious challenges to its claim. The fines are not proven to be properly assessed by resolution and if the notices reflect the resolutions they are fundamentally flawed. The resolution to remove the pet is equally flawed. Absolutely fatal to the claim for costs for the proceedings to remove the pet is that at the time the Originating Notice was brought the offending pet had been removed from Chevillard's unit. It is true that Chevillard failed to advise that it had been removed nor provided documentary evidence as demanded but no where in the Bylaw's does that constitute a breach. Without ascertaining the status of the pet, the Condo Corp. decided to forge ahead with legal action. It did so at its own peril.

[26] Under the circumstances, the Condo Corp. has not established an entitlement to costs nor in my view is it appropriate for it to recover any costs as against Chevillard in relation to these proceedings.

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

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

Appearances:

Lindsey Miller
Field LLP
for the Applicant

Ralph Chevillard
self -represented