

Court of King's Bench of Alberta

Citation: Porter v Condominium Corporation No. 042 5177, 2024 ABKB 140

Date: 20240312
Docket: 2203 19890
Registry: Edmonton

Between:

Jonah Gordon Porter

Applicant

- and -

Condominium Corporation No. 042 5177

Respondent

Reasons for Decision – Award of Costs of the Honourable Justice R. Paul Belzil

[1] The following Reasons deal with the award of costs arising from my Decision of January 23, 2024, wherein I dismissed, in its entirety, an Originating Application filed by Jonah Porter (Porter) on December 19, 2022.

[2] Although he is now represented by counsel, he was not previously represented by counsel in the application before me or in previous proceedings.

1. Factual Background

[3] There is a lengthy history of litigation between Porter and Condominium Corporation 042 5177 (Corporation) and its Board of Directors (Board).

[4] In 2018, Porter owned a unit in a Condominium in Edmonton known as “The Ten”. In that year, the Board became aware that Porter, along with 3 other unit owners, were renting their units on web based platforms similar to Airbnb. The Board took the position that the bylaws of the Corporation prohibited short term rentals where no lease was entered into, pursuant to s. 32(5) of the *Condominium Property Act* RSA 2000 c.C-22 as amended (*Act*).

[5] On October 21, 2019, in a decision cited 2019 ABQB 814 Renke, J. issued an Interim Injunction enjoining unit owners from using their units for short term rentals. On February 27, 2020, I issued a written decision, cited *Condo Corporation 042 5177 v Kuzio* 2020 ABQB 152, wherein I issued a Permanent Injunction enjoining unit owners from using their units for short term rentals. In doing so, I held that the bylaws of the Corporation prohibited short term rentals where no lease was entered into.

[6] My Decision was not appealed and remains in full force and effect.

[7] In 2021, Porter purported to enter into a residential lease of his unit with an individual and subsequently purported to enter into similar residential leases with 2 other individuals.

[8] The Board objected to these purported leases on the basis that they were not *bona fide* leases but rather licenses which were a colourable attempt to circumvent my decision of February 27, 2020.

[9] The Board directed the management company operating the condominium to inform Porter that short term leases were prohibited. In addition, additional parking fobs for the unit were temporarily disabled.

[10] On December 19, 2022, Porter filed an Originating Application wherein he requested various heads of relief including a declaration that the agreements he entered into with the 3 individuals were valid leases, pursuant to s. 32(5) of the *Act*. He also requested injunctive relief against the corporation.

[11] In support of his Originating Application, he filed an affidavit dated December 19, 2022, wherein he alleged that the Corporation acted improperly towards him in a number of respects summarized as follows:

- a) Acted unreasonably and unjustly;
- b) Misused its powers;
- c) Acted arbitrarily and high handedly;
- d) Acted Prejudicially;
- e) Acted Vindictively;
- f) Acted with Intentional malice;
- g) Engaged in criminal intimidation.

[12] On January 23, 2024, in a written decision, cited 2024 ABKB 41, I dismissed the Originating Application in its entirety. Specifically, I rejected all of the allegations of misconduct directed at the Corporation by Porter and held that the leases he purportedly entered into were not leases but rather licences.

[13] In doing so, I held that the conduct of Porter was a flagrant attempt to circumvent my decision of February 27, 2020. I also held that the Corporation acted reasonably throughout in responding to Porter's actions.

[14] In dismissing the Originating Application, I directed that the parties speak to costs. The Corporation seeks costs on a solicitor and own client basis or in the alternative enhanced costs.

[15] Counsel for Porter concedes that an award of costs is warranted and argues that an award of costs under column 2 of Schedule C is appropriate.

[16] *Rule 10.33* of the *Alberta Rules of Court* governs the awarding of costs. I identify the following factors as being relevant to the award of costs arising from my decision:

1. The Corporation was entirely successful. All of Porter's claims were dismissed.
2. The Originating Application involved a number of issues pertinent to the conduct of the Board.
3. The matter is not complex.
4. The following additional matters are also relevant to the awarding of costs:
 - a. The Respondent Corporation is a statutory creation under the *Act* and is not a "for profit" corporation.
 - b. Unit owners bear costs incurred which are not recoverable from Porter.
 - c. In his application, Porter made a number of very serious allegations of misconduct by the Board including, misuse of the Board's authority, irresponsible and improper acts, arbitrary and high-handed conduct, bias, unilateral conduct, harassing and demeaning behavior and criminal intimidation.

[17] Paragraphs 36 to 41 of my Decision read as follows:

[36] Given my decision, which remains in full force and effect, the Corporation was legally entitled to use reasonable measures to thwart the Applicant's continued efforts to use his unit for short term rentals which was a flagrant attempt to circumvent my decision. The Corporation imposed a monetary fine against the Applicant of \$3,000 and disabled Ms. El Sherbani's parkade fob. All of the Applicant's parkade fobs were reinstated once Ms. El Sherbani vacated the unit.

[37] On this evidentiary record the actions of the Corporation were not abusive or excessive and did not amount to harassment. The actions of the Corporation are properly characterized as rigorous enforcement of the bylaws in the face of ongoing contraventions of them.

[38] It bears noting that the Corporation communicated to the Applicant on numerous occasions that short term rentals were prohibited. The Corporation made every effort to avoid conflict with the Applicant.

[39] From February 27 2020, onward the Applicant was fully aware that the Corporation was on solid legal ground in prohibiting short term rentals.

[40] There was ample opportunity for the Applicant to comply with my decision and indeed several other unit owners who were using their units for short term rentals did comply.

[41] In the result, I do not accept that the Applicant has established any breach of s. 67.

2. Is an Award of Solicitor and Own Client Costs Appropriate?

[18] The Corporation has incurred legal fees to date of \$53,348.00 exclusive of disbursements and GST responding to the Originating Application filed by Porter.

[19] The Corporation argues that an award of Solicitor and own Client costs is warranted given that Porter made unsubstantiated allegations of serious impropriety against the Corporation, none of which were substantiated.

[20] Counsel for Porter argues that an award of Solicitor and own Client costs is exceptional, and this is observed in the decision of *ET v. Rocky Mountain Play Therapy Institute Inc.* 2016 ABQB 299 at paragraph 6.

[21] I have concluded that there are no exceptional circumstances present in this case which would justify an award of Solicitor and own Client costs. In particular, I note that at no time did Porter engage in litigation misconduct. Although he is now represented by counsel, while self represented he was cooperative with opposing counsel and the Court.

[22] In the result the claim for an award of Solicitor and own Client costs is dismissed.

3. Is an Order of Enhanced Costs Appropriate?

[23] As noted in the *ET* decision in paragraph 9, enhanced costs may be awarded when allegations of serious impropriety are advanced unsuccessfully.

[24] In the case of *College of Physicians and Surgeons of the Province of Alberta v JH* 2009 ABQB 48 at paragraph 47, it was observed that baseless allegations cannot be made with impunity in civil proceedings.

[25] I acknowledge that the *College of Medical Physicians* decision involved allegations made against a medical doctor, however baseless allegations in this case involve Board members accused of serious impropriety. The principle is analogous.

[26] None of the allegations made by Porter were substantiated. Moreover, I concluded that at all times the Board acted reasonably.

[27] Following my decision of February 27, 2020, Porter could easily have avoided conflict with the Board by consulting with the Board as to whether or not his purported leases would be problematic. He failed to do so and indeed I concluded in my decision that he made flagrant efforts to circumvent my decision.

[28] Considering the totality of the circumstances I have concluded that an enhanced award of costs is appropriate.

[29] The Alberta Court of Appeal in the decision of *McCallister v Calgary (City)* 2021 ABCA 25 at paragraph 42, endorsed the earlier decision of the Alberta Court of Appeal in *Weatherford*

Canada Partnership v Artemis Kautschuk und Kunststoff-Tehnik GmbH 2019 ABCA 92, to the effect that party and party costs should approximate 40 to 50% of actual costs.

[30] Column 2 results in an award of costs of \$6,575.00. I have concluded that triple Column 2 should be awarded, resulting in an award of costs of \$19,725.00 which is approximately thirty-seven percent of solicitor-client costs on the *McAllister* scale. This is clearly the low end of the *McAllister* scale.

[31] In addition, the Corporation is entitled to recover disbursements and GST.

Heard on the 1st day of March 2024.

Dated at the City of Edmonton, Alberta this 12th day of March 2024.

R. Paul Belzil
J.C.K.B.A.

Appearances:

Keith Marlowe, K.C.
Blake, Cassels & Graydon LLP
for the Applicant

Erin Berney and Sarah Denholm
Field Law LLP
for the Respondent