

Court of Queen's Bench of Alberta

Citation: Condominium Corporation No 042 5177 v Kuzio, 2020 ABQB 152

Date: 20200227
Docket: 1903 15696
Registry: Edmonton

Between:

Condominium Corporation No. 042 5177

Applicant

- and -

Drew Kuzio, James Knull, Jonah Porter, 2131497 Alberta Ltd. and Dr. Tan Lin

Respondents

**Reasons for Decision
of the
Honourable Mr. Justice R. Paul Belzil**

The Application

[1] On February 21, 2020, I heard an application to make permanent an Interim Injunction which enjoined condominium unit (“unit”) owners from renting their units on short term rentals facilitated by Web based platforms like Airbnb, where no lease is entered into.

[2] By agreement, the application dealt only with the issue of whether the *Condominium Property Act*, RSA 2000, c C-22 (as amended) (“CPA”) and Bylaws of the Condominium Corporation (“Corporation”) prohibit short term unit rentals where there is no lease.

[3] The issue of remedies, including damages, will be argued at a later date.

[4] Counsel for the Respondent Jonah Porter, who is a unit owner, filed a brief and presented oral argument. The Respondents Drew Kuzio and James Knull, who are unit owners, appeared at the application without counsel and filed no materials.

[5] Dr. Lin, who is the sole director and shareholder of 2131497 Alberta Ltd. (“213”), which also owns a unit, did not appear and filed no materials.

Factual Background

[6] The Corporation operates The Ten Lofts Condominium in Edmonton, comprising 69 residential units.

[7] In 2018, the Board of Directors of the Corporation (“Board”) became aware that Kuzio, Knull, Porter and 213 were listing their units on short term accommodation websites like Airbnb wherein no lease is entered into. On becoming aware of this situation, the Board instructed the property manager for the Corporation, to send a letter to the Respondents advising that short term rentals of their units violated the Bylaws of the Corporation.

[8] The Applicant alleges that the Respondents continued with short term rentals of their units, notwithstanding demands that they stop doing so.

[9] The Applicant applied for an Interim Injunction, which was granted by Renke J on October 21, 2019, in a decision cited 2019 ABQB 814.

[10] It was not disputed before me, that the Respondents were engaged in short term rentals of their units using Web platforms like Airbnb, which was also conceded before Renke J.

[11] There is no allegation that any of the Respondents have violated the terms of the Interim Injunction.

[12] The Applicant seeks the following relief:

1. that the Interim Injunction granted by Renke J be made permanent;
2. that a declaration be granted as follows:
 - a. that the Bylaws validly prohibit unit owners from operating Airbnb-like accommodations in units;
 - b. that the Respondents are in violation of the Bylaws as alleged.

[13] Declaratory relief was also requested pertaining to the issue of remedies, which will be the subject of further argument.

Airbnb Style Short Term Rentals

[14] It is uncontroverted that in the last few years, a number of Web based platforms have been created to facilitate short term rentals of residential properties, including condominium units. A non exhaustive list includes Airbnb, Expedia.ca, Kayak.com and HomeAway.ca.

[15] For the purposes of this application, the evidence established that Porter, Kuzio and 213 – Dr. Lin utilized Airbnb for short term rentals of their condominium units whereas Knull utilized HomeAway.ca. For the sake of simplicity in this decision, I will use the generic term “Airbnb” to

represent all Web based short term rental platforms where no lease is entered into. It was agreed that nothing turns on this generic description of Web based rental platforms.

What is the Legal Status of a Short Term Airbnb Renter Where No Lease Is Entered Into?

[16] One of the key issues to be determined in this application, is the legal status of someone who temporarily occupies a condominium unit pursuant to a contractual arrangement facilitated by a web based platform like Airbnb.

[17] The Applicant submits, that this type of arrangement amounts to nothing more than a license, which is not a lease.

[18] Counsel for the Respondent Porter submits, that anyone entering into such an arrangement becomes a tenant under the Bylaws of the Corporation, even if the term of possession is one night. He also submits that the only difference between a lease and license is the length of possession.

[19] It is well established that a lease creates an enforceable interest in real property.

[20] As noted in *Lauder Industries Inc v Reid*, 2018 ABQB 568 at para 50, a license is a contractual right to use land but does not create an interest in land.

[21] Accordingly, a lease of real property and a license to use it, are not the same legal concept. A lessee has more legal rights than a licensee. Indeed, but for the license, the occupier would be a trespasser.

[22] There is no evidence that the Respondents entered into leases with any Airbnb renters or ever contemplated doing so.

[23] While by no means dispositive of the issue, Airbnb documents presented in argument describe renters as licensees and nowhere does the documentation refer to renters as tenants or lessees.

[24] The Applicant submits that Airbnb renters are the functional equivalent of hotel guests who are mere licensees, and who acquire no interest in property.

[25] In his Interim Injunction decision, Renke J, at para 61 describes the Airbnb rental arrangement as the functional equivalent of a hotel. I agree with his analysis.

[26] In the result, I conclude that Airbnb rentals are licenses, not leases.

Is the Short Term License of Condominium Units Permitted by Section 32(5) of the CPA Where No Lease Is Entered Into?

[27] Having concluded that Airbnb rentals are licenses, the issue then arises as to whether short term licensing of condominium units is captured by the wording of s 32(5) of the CPA?

[28] Section 32(5) reads as follows:

(5) No bylaw operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage or other dealing with them or to destroy or modify any easement implied or created by this Act.

(emphasis added)

[29] The Applicant acknowledges that an owner of a unit is free to lease it. However, the Applicant submits that the Corporation can prohibit by Bylaw, short term rentals of units, where no lease is entered into.

[30] The Respondent argues that s 32(5) creates an unrestricted right to alienate the unit.

[31] In the Sixth Edition of *Sullivan on the Construction of Statutes*, the following passage at para 2.1:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[32] In the Applicant's brief, it is noted that a transfer, lease or mortgage creates an interest in a real property, capable of being enforceable against a third party.

[33] As noted above, a license creates no such interest.

[34] The phrase "or other dealing" is not defined.

[35] As noted in *Sullivan* at pages 234-236, the interpretative principle of *ejusdem generis* applies such that the phrase "or other dealing" must refer to the enumerated terms "transfer, lease or mortgage".

[36] The Applicant submits accordingly that the phrase "or other dealing" can only apply to a dealing involving interests in real property capable of enforcement against third parties, which would exclude licenses to occupy property.

[37] The Respondent counters by submitting that s 32(5) creates an unrestricted right for a unit owner to alienate the unit but cited no authority for this proposition.

[38] I do not accept this interpretation of the scope of s 32(5).

[39] While I accept that s 32(5) should be given a broad and purposive interpretation, this does not mean that the right to alienate a unit is unrestricted.

[40] Firstly, s 32(5) does not reference licenses. Secondly, if the Legislature had intended that there be an unrestricted right of alienation, it could have easily said so and there would be no need to list the types of alienation which are permitted.

[41] The CPA creates a legal framework for communal living. There is no reference to short term rentals in the CPA.

[42] Unit owners share common property and agree that management of the condominium will be under the control of the Board of Directors which may pass Bylaws governing all unit owners.

[43] At the time of purchase, each of the Respondents agreed to this legal framework, as did every unit purchaser.

[44] This necessarily involves a surrender of a measure of autonomy by individual unit owners which is offset by the advantage such an arrangement brings.

[45] In a number of cases, it has been observed, that while unit owners own their units in fee simple, this is not the same as owning real property in fee simple not under the control of a Board of Directors which enacts Bylaws.

[46] In *Condominium Plan No 9524710 (Owners) v Webb*, 1999 ABQB 7, the following passages appear at paras 19 & 20:

[19] Though not dealing with the same issue, the following statement of Finlayson, J.A., speaking for the Ontario Court of Appeal in *Carleton Condominium Corp. No. 279 and Rochon et al* (1987) 1987 CanLII 4222 (ON CA), 59 O.R. (2d) 545 is equally applicable to this case.

The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound. There is no place in this scheme for any private arrangement between the developer and an individual unit owner. If an individual arrangement is made, it must be disclosed in the declaration (s. 3(1)(f)).

[20] In the case of *Sterling Village Condominium Inc. v. Breitenbach*, 251 So. 2d 685 (Fla. 4th D.C.A. 1971) a decision of the District Court of Appeal of Florida. Driver, B.J., Associate Judge, speaking for the Court, said at p. 688:

Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominiums living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be.

[47] In *Devlin v Owners: Condominium Plan No 9612647*, 2002 ABQB 358, the following passage appears at para 19:

The very nature of condominium construction would indicate that some restrictions on the use and occupancy of the individual units, such as provisions for one family occupancy, age restrictions of unit owners, anti-commercial use and the like, should be permitted in the restrictive covenant...

[48] The CPA is drafted to reflect a balancing of interests, which balance is clearly made known to anyone purchasing a unit in the condominium.

[49] Given the legislative intent of the CPA as a whole, I do not accept that s 32(5) should be interpreted in a manner which undermines the statute's very integrity.

[50] If the Respondent's argument were accepted, the Board would have its ability to manage the Corporation significantly impaired.

[51] This would result in a small minority of unit owners unilaterally changing the character of the condominium regime thus adversely affecting the majority of unit owners, without their consent.

[52] I have concluded that s 32(5) must be interpreted to permit Bylaws which restrict alienation of units other than by transfer, lease, mortgage or other dealings which refer to these enumerated legal concepts. Accordingly, Bylaws which prohibit short term rentals are *intra vires* the Board.

Do the Bylaws of the Corporation Prohibit Short Term Occupancy of a Unit Where No Lease is Entered Into?

[53] Sections 6.01.1 and 6.01.2 of the Bylaws are the operative sections and read as follows:

6.01 ONE-FAMILY UNIT

6.01.1 Each Unit shall only be occupied as a one-family residence by the Owner of the Unit, the Owner’s family and guests, or a Tenant of the Owner, and the Tenant’s family and guests, and for the purpose of these By-laws:

- a. “guests” are to be construed as individuals visiting or residing with the Owner of the Tenant;
- b. “one family residence” means a residence occupied or intended to be occupied as residence by one family along [sic] and continuing [sic] one kitchen and in which no Roomer or Boarder is allowed;
- c. “Boarder” means a person to whom room and board is regularly supplied for consideration; and
- d. “Roomer” is a person to whom a room is regularly supplied for consideration.

6.01.2 No Unit shall be used in whole or in part for any commercial or professional purpose involving the attendance of the public at such Unit and without limiting the generality of the foregoing, no Unit or part therefore shall be used as an office by a doctor, dentist, chiropractor, drugless practitioner, or other professional person, except as otherwise authorized by the Board in writing, which approval may be arbitrarily withheld and if given, by [sic] withdrawn at any time on Thirty (30) days notice.

(emphasis added)

[54] The Respondent concedes that Airbnb renters are not guests, borders or roomers as defined in the Bylaws but argues that they are tenants, even if the period of occupancy is very brief.

[55] In support of his argument, counsel for Porter relied on para 103.2 of the Bylaws, which reads as follows:

These By-laws are to be read with all changes of number and gender as required by the context; and the word “Owner” shall be read as “Tenant”, “Resident” or “Occupier” as the context may require.

(emphasis added)

[56] He argued that use of the word “occupier” in this section must be interpreted to mean that the Bylaws contemplated that someone other than a tenant or resident could legally occupy the unit.

[57] I do not accept this argument.

[58] The opening words of 601.2 are critical: “No unit shall be used in whole or in part for any commercial or professional purpose involving the attendance of the public at such unit and without limiting the generality of the foregoing...”.

[59] In the absence of a lease, occupancy by someone who pays to occupy the premises results in the unit being used for commercial purposes, that is the generation of income which is clearly prohibited by the section.

[60] Although the term “commercial” is not defined in the Bylaws, in context it can only mean using the unit to generate income.

[61] The ability to generate income from the unit, in the absence of a lease, is severely restricted. Using the unit for a professional purpose like a medical or dental office requires the Board’s authorization, which may be arbitrarily withheld.

[62] The wording of para 6.01.2 does not support the argument of the Respondents that the Bylaws as drafted either permits or does not disallow short term rentals, where no lease exists.

[63] There is no suggestion that the Board ever authorized the short term rentals of these units or any other units in the complex. Indeed, the Respondents were repeatedly warned that short term rentals of their units contravene the Bylaws but they chose to ignore these warnings.

[64] The terms “tenant”, “resident” and “occupied” are not defined in the CPA or the Bylaws.

[65] In context, the term “tenant” must mean someone who is domiciled in a unit for a period of time.

[66] A domicile can generally be defined as a location where a person habitually resides. A domicile is where one would keep important documents and other personal items and where one would store the bulk of one’s clothing, habitually prepare and eat meals, sleep and spend leisure time. A domicile is typically what one would refer to as “home” and which would be registered with various governmental agencies and would be used as a postal address.

[67] A short term rental through Airbnb shares none of these characteristics. The renter’s domicile is elsewhere and the renter would only bring clothing suitable for the length of the stay. It is hard to imagine a situation wherein a short term renter through Airbnb would direct mail to the rental location or register it with any governmental agency.

[68] This distinction was recognized in *Albrecht v Condominium Corporation No 0411156*, 2011 ABQB 53 at para 64:

Section 5 provides that an owner will not use or permit the use of his unit other than as a single family dwelling. Interestingly, Mr. Turcott and Stone Creek sought to remove this restriction in their earlier proposals. The respondents argue that such a restriction is absurd as it could be used to prevent an owner and his friends from using his unit. Perhaps that is so but s.104 of the bylaws calls for strict compliance. In any event, there is a distinction in both kind and quality between an owner bring a few friends to his unit for a stay and that of an owner such as the respondents, using the unit as a resort club with a significant number of different “families” using the unit on a rotational type of basis (as appears would be the case from the description of how the club would use these units). I find that the proposed resort club use is in breach of strict compliance of s.5 of the Corporation’s Rules and regulations.

[69] In *Ottawa-Carleton Standard Condominium Corporation No 961 v Menzies*, 2016 ONSC 7699, the following passage appears at para 51:

“Single family use” cannot be interpreted to include one’s operation of a hotel-like business, with units being offered to complete strangers on the internet, on a repeated basis, for durations as short as a single night. Single family use is incompatible with the concepts of “check in” and “check out” times, “cancellation policies”, “security deposits”, “cleaning fees”, instructions on what to do with dirty towels/sheets and it does not operate on credit card payments.

[70] While I appreciate that the Ontario condominium legislation differs from the CPA, nonetheless the distinction between single family use and short term use in that decision is still valid.

[71] Reduced to its essence, short term occupancy through platforms like Airbnb, where no lease is entered into, results in the functional equivalent of a hotel stay.

[72] In the result, Airbnb renters are not tenants of the owner, but occupy as licensees for consideration.

[73] The short term rental of units, in the absence of a lease, not only contravenes the Bylaws of the Corporation but would result in a fundamental change to the structure and character of the condominium, without the consent of the Board and without the consent of the vast majority of unit owners.

Conclusion

[74] The Applicant is entitled to a Declaration that the Bylaws of the Corporation are *intra vires* of it and prohibit short term Airbnb style unit rentals where no lease is entered into.

[75] The Interim Injunction granted by Renke J on October 21, 2019 will become a permanent Injunction. The terms of the permanent Injunction will be the subject of further argument. Pending further argument, the terms of the Interim Injunction remain in place.

[76] As well, I will hear further argument on the issue of remedies. Costs will be spoken to at the conclusion of argument.

Heard on the 21st day of February, 2020.

Dated at the City of Edmonton, Alberta this 27th day of February, 2020.

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

Appearances:

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James Knull
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2131497 Alberta Ltd. and Dr. Tan Lin
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