
CANADA / JUDGMENT

A.E.P. v. M.K.

2021 BCSC 1785

COURT

Supreme Court of British Columbia

DECIDED

9 July 2021

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2021 BCSC 1785 A.E.P. v. M.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.E.P. v. M.K.,

2021 BCSC 1785

Date: 20210709

Docket: E181357

Registry: Vancouver

Between:

A.E.P. also known as A.P.

Claimant

And

M.K., Lazar Klot and Lyubov Klot

Respondents

Before: The Honourable Madam Justice Wilkinson

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

K. Lawrence

Counsel for M.K.:

A.E. Thiele

Counsel for Lazar Klot and Lyubov Klot:

L.R. Nambiar

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 30, 2021

Place and Date of Judgment:

Vancouver, B.C.

July 9, 2021

- [1] THE COURT: These are my reasons for judgment on an application by the claimant in this matter. As they are oral reasons, I reserve the right to edit them if a transcript is ordered, but of course, the end result will not change.

Introduction

- [2] The claimant, A.E.P., brings this application for an interim advance from family property and an order with respect to the application of terms of a previous order as they apply to the respondents, Lazar Klot and Lyubov Klot.
- [3] The parties settled other matters set to be heard with this application and entered into consent orders at the hearing of the application on June 30, 2021.

Background

- [4] A.E.P. and the respondent, M.K., had a relationship for approximately 22 years and have two children who are now 17 and 13 years old. A.E.P. and M.K. separated in 2018.
- [5] There have been a number of orders issued in this family law matter. The claimant filed her notice of family claim on May 17, 2018. With regard to family property, the claimant set out eight properties in which she claims an interest. The claimant is registered on title to two of those properties as a joint tenant along with the respondent M.K. and the respondents Lazar Klot and Lyubov Klot (M.K.'s parents). The other six properties are registered only in the names of M.K. and his parents.
- [6] A.E.P. and M.K. currently report rental income from the properties as their only sources of income. M.K.'s 2013 criminal charges in the United States for drug trafficking indicates the likelihood of another source of income in the past. I heard from counsel that M.K. is or was on a period of probation after those charges were resolved. A.E.P. had no outside employment during the relationship.

- [7] On August 6, 2019, A.E.P. and M.K. entered into a consent order with respect to A.E.P.'s application for spousal and child support. At that time, M.K.'s parents were not parties to the family claim nor did they appear on the application. That order provided as follows with regard to rental income from two of the properties which are located in Whistler and called the Alpine Way and Summer Lane properties:
- a) Commencing July 1, 2019, on a without-prejudice basis to either party's position at trial, the claimant shall retain all of the Alpine Way property upstairs suite rental income and all of the Summer Lane property main house rental income until further agreement between the parties or order of the court;
 - b) Commencing July 1, 2019, on a without-prejudice basis to either party's position at trial, in the event that the rental income that the claimant retains from the Alpine Way property upstairs suite and the Summer Lane property main house is less than \$8,000 in any given month, then the respondent shall provide the claimant with \$8,000 to supplement the lost rental income forthwith.
- [8] The Summer Lane property also has a garage suite which is rented out to a long-term tenant.
- [9] A second order was made on September 18, 2019, restraining M.K. from attending at the Whistler properties mentioned in the Order or communicating with tenants there.
- [10] On July 10, 2020, a further consent order was made with M.K.'s parents appearing, although not yet joined as parties, ordering M.K. to restrain his parents or any other agent from interfering with A.E.P.'s existing bookings for the Summer Lane property until August 13, 2020, and that neither A.E.P. nor M.K. may book other rentals for that property until after a hearing that was set for August 24, 2020.
- [11] On August 24, 2020, after application, the court ordered M.K.'s parents to be added as respondents to the family claim. A.E.P. claims that M.K.'s parents hold some or all of their registered interests in the properties in trust for M.K. As noted above, all of M.K.'s interests in the properties are claimed as family property.
- [12] After a hearing on October 14, 2020, on November 17, 2020, the court ordered fines totalling \$20,000 against M.K. including fines for contravention of orders regarding the Whistler properties and prohibited M.K. from advertising the rental of the Whistler properties or engaging a third party to collect rent or contact any current or potential tenant. M.K.'s parents were provided with notice of the application, but did not appear.
- [13] On June 17, 2021, the parties entered into a consent order for the payment of \$27,483.53 by M.K. to A.P. for the difference owed for each month the rental income was less than \$8,000 plus costs.
- [14] M.K. has not paid any of the court-ordered fines, rent difference, plus costs.

[15] Trial dates were originally set for November 2019, but adjourned due to a lack of judges. The trial was rescheduled for June 22, 2020, but cancelled due to the COVID-19 pandemic. The trial of this matter is now set to commence on October 4, 2021, for 14 days.

Application for interim advance

[16] With regard to an application for an interim advance, s. 89 of the Family Law Act, S.B.C. 2011, c. 25 provides as follows:

Orders for interim distribution of property

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

[17] From the authorities referred to me, including *I.F. v. R.J.R.*, 2015 BCSC 793; *Nelson v. Woodward*, 2020 BCSC 399; *Negus v. Yehia*, 2015 BCSC 857; and *McKenny v. McKenny*, 2015 BCSC 1345, the purpose of the provision and approach to be taken by the court under s. 89 is as follows:

- a) Section 89 of the FLA assists economically disadvantaged spouses to access justice and helps to level the playing field especially where one spouse controls all or the majority of the family wealth and assets;
- b) The harm contemplated relates to actual or potential economic harm and would encompass adverse impact on the other spouse's lifestyle or effectively prejudice their argument for reapportionment or position;
- c) Even if a recipient spouse can only repay the distribution over a reasonable period of time after trial that in of itself does not qualify as harmful to the other spouse;
- d) Commercial inconvenience does not equal harm; and
- e) The applicant must show that an advance is required to mount a challenge to the other spouse's position at trial.

[18] A.E.P. has provided evidence of her anticipated legal costs to take her claim to trial which totals approximately \$200,000. She has insufficient cash and has incurred credit card debt. M.K. has not made payment toward the court orders. M.K.'s parents dispute A.E.P.'s ability to rent out one of the Summer Lane properties, that being the main house. Experts will be required with respect to the valuation of the assets of the parties. A.E.P. has already incurred costs including costs required to obtain orders to enforce existing court orders. She is

unable to obtain financing due to her poor credit status and has no family to rely upon for financial assistance.

- [19] From the evidence before me, including M.K.'s own financial statement of July 2019, assuming M.K.'s parents registered interests are not held in trust for M.K., the net value of the family assets held in the eight real properties, even accounting for capital gains, is at least \$5 million. The properties on which A.E.P. is registered on title have a net value of at least \$1.3 million.
- [20] M.K., while opposing the application, provided no evidence of his own in response. M.K.'s parents provided evidence to rebut A.E.P.'s trust claim and object to any order which directs any of the properties to be sold. His parents also provided evidence of the renting out of the house M.K. lives in while in Vancouver for \$42,000 this summer as M.K. will be residing in their home. None of the respondents have provided evidence that A.E.P. can finance her legal expenses without an advance.
- [21] It is clear that A.E.P.'s claim with respect to M.K.'s parents is being vigorously defended. I cannot say that it is without merit or bound to fail. There is disagreement regarding the financial arrangements between the parties including the renting of the properties and allocation of income and expenses. Parenting and support issues remain outstanding. M.K. has failed to pay the agreed-upon amounts for interim spousal and child support as ordered by the court in the past. The parties' sources of income and status of assets will be complicated to ascertain. The exact length of the relationship is also in dispute, which may have implications with regard to claims in one or more of the properties.
- [22] On the evidence before me, I am satisfied that an advance on A.E.P.'s family property claim is necessary in order to deal with the complicated issues of asset division as well as parenting and spousal support issues on an equal basis with M.K. Furthermore, like the circumstances in *M.A.L. v. N.A.L.*, 2014 BCSC 203, given the equity in the properties in which A.E.P. is registered on title, the length of the relationship, and the assets to which M.K. has access, being all eight of the properties, I find that it would not be harmful to M.K.'s interest for an interim distribution to take place.
- [23] The estimate provided by A.E.P. may, as counsel for M.K. stated, be a little excessive. I order an interim distribution of \$175,000 as a reasonable advance to be paid by M.K. to A.E.P. by August 30, 2021.
- [24] A.E.P. requested that the court order the sale of one or more of the properties to satisfy the distribution ordered. Since M.K.'s parents are on title to each of those properties, I am alive to their concern that a sale would irreparably harm their interests and claims to those properties.
- [25] In light of the appeal of this court's decision in *Etemadi v. Maali*, 2020 BCSC 1908 which is under reserve by the Court of Appeal, and M.K.'s parents' position with respect to irreparable harm to them, A.E.P. invited me to simply order a distribution. This would leave

it up to M.K. as to how the funds will be acquired including through financing on one or more of the properties. I agree with that proposal. I will also order that if the distribution is obtained from financing of any other properties, all of the properties will cooperate in securing the funds as applicable and M.K. will be responsible for all costs, including interest, subject to a determination at trial of who should ultimately bear the responsibilities for those costs.

Ability of A.E.P. to rent out the main house at Summer Lane, Whistler

- [26] M.K.'s parents take the position now that the main house at the Summer Lane property cannot be rented out by A.E.P. due to the bylaw prohibiting short-term rentals and requiring rentals over one month to be residential tenancies regulated under the Residential Tenancy Act, S.B.C. 2002, c. 78. They further state that they intend to spend some or all of the summer in the property themselves.
- [27] As well, M.K. and M.K.'s parents take the position that, as long as A.E.P. receives \$8,000 a month from rental income or a combination of rental and top-off from M.K., the court orders with respect to A.E.P.'s rental authority are satisfied. That is, they say A.E.P. is not entitled to rent the Summer Lane main house if A.E.P. is receiving at least \$8,000 from the Alpine Way, Whistler, rental and/or M.K. Currently, A.E.P. is receiving \$6,500 a month from Alpine Way and \$1,500 a month from M.K. directly. They also note that the property is not insured for rental purposes.
- [28] A.E.P. has secured a rental for the summer from a tenant who has rented the property in the past to commence July 19, 2021. She takes the position that court orders specifically permit her to rent out the Summer Lane main house and it was contemplated the \$8,000 was a floor, not a ceiling. She also submits that she acts in compliance with the Whistler Bylaws and has confirmed that with authorities.
- [29] It is clear that the Summer Lane main house has been rented out in the past to the knowledge of all the parties, before and after the Whistler bylaw came into force. While the Summer Lane property has a long-term tenant in its garage suite and the main house has been rented in the past, the insurance status must have been known to all. M.K. has acted in a manner reflecting his understanding that he and A.E.P. have sole decision-making authority with respect to renting out the Whistler properties.
- [30] M.K.'s parents have not applied to vary the court orders which specifically provide A.E.P. with the ability to manage and rent out the Whistler properties on a without prejudice basis. M.K.'s parents were parties at the time of the October 14, 2020 order regarding management of the Whistler rentals, when they took no position on the application.

- [31] I cannot say that the court orders limit A.E.P.'s income from the rental properties to \$8,000 a month. There is no limit placed on the amounts A.E.P. can charge for the rentals. It is indeed a floor. M.K.'s parents have not applied to vary the orders which addressed A.E.P.'s authority to rent and manage the properties without prejudice to the claims of the properties.
- [32] Restricting A.E.P.'s income does not help anyone at this point, particularly when M.K. has not complied with the minimum payment make-up order. These funds are intended to be child and spousal support.
- [33] I confirm that A.E.P. is authorized to rent the Summer Lane main house in accordance with the orders made on August 6, 2019, July 10, 2020, and November 17, 2020.

Conclusion

[34] In conclusion, I make the following orders:

1. Pursuant to s. 89 of the FLA, the respondent, M.K. is to make an interim distribution of \$175,000 to A.E.P. by August 30, 2021;
2. If the distribution is obtained from financing of any of the properties set out in the Notice of Family Claim, all of the parties will cooperate in securing the funds as applicable;
3. The respondent, M.K., will be responsible for all costs, including interest subject to a determination at trial of who should ultimately bear the responsibility for these costs; and
4. A.E.P. is authorized to rent the Summer Lane main house in accordance with the orders made on August 6, 2019, July 10, 2020, and November 17, 2020.

Costs

[35] As counsel did not make any submissions on costs at the application, I will entertain submissions at this time.

[SUBMISSIONS]

[36] THE COURT: All right. I will order costs payable in any event of the cause, but not forthwith. Thank you.

"Wilkinson J."

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