
CANADA / JUDGMENT

Borrero v. Rico

2017 BCSC 84

COURT

Supreme Court of British Columbia

DECIDED

19 January 2017

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2017 BCSC 84 Borrero v. Rico

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Borrero v. Rico,

2017 BCSC 84

Date: 20170119

Docket: E160673

Registry: Victoria

Between:

Alain Addys Roca Borrero

Claimant

And

Iliana Rosabal Rico

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 23 1. where changes were made on February 10, 2017

Before: Master Bouck

Reasons for Judgment

Counsel for the Claimant:

B. Contreras

Counsel for the Respondent:

E. Bowman

Place and Date of Hearing:

Victoria, B.C.

December 6, 2016 and

January 9, 2017

Place and Date of Judgment:

Victoria, B.C.

January 19, 2017

Introduction

- [1] This is a family law proceeding in which the respondent has filed a jurisdictional response, but no other pleadings or affidavit material. The claimant, Mr. Roca, seeks a divorce, spousal support and division of family assets. These reasons address the outcome of an application brought by the claimant seeking interim spousal support, financial disclosure and certain remedies with respect to purported family property located in Vancouver, British Columbia.
- [2] Mr. Roca is a Cuban citizen and presently resides in that country. Ms. Rico lives in Vancouver. The evidence suggests, but does not confirm, that she holds Canadian citizenship.
- [3] The parties seem to agree that they were legally married on August 21, 2013 and separated about one year later. The parties also agree that a form of divorce order was obtained by the respondent in Cuba on June 15, 2015, but the claimant now takes issue with the enforceability of that order. In the absence of further responsive material from Ms. Rico, it is impossible to determine whether there is any other common ground between the parties.

The Application

- [4] Mr. Roca's application, which was filed on October 6, 2016 and set to be heard 60 days later, seeks the following relief (paraphrased):
 - 1. Interim spousal support commencing February 1, 2016 in the sum of \$10,000 or such greater amount as the court may be advised or deem just;
 - 2. A declaration that the net sale proceeds from the sale of the purported family residence at 1201 - 1501 Howe Street, Vancouver, B.C. is family property;
 - 3. An order that the respondent provide the claimant with \$100,000 or such other sum as the court deems appropriate as an interim distribution of family property;

4. An order that Ms. Rico file a financial statement in compliance with the SCFR and provide extensive disclosure of bank accounts and credit card statements together with an inventory of assets to which she claims a legal or beneficial interest;
5. An order that Ms. Rico disclose details and relevant documents with respect to the financial terms of a previous divorce order or settlement.

Background Facts

- [5] As noted, there is no affidavit material from the respondent. At the hearings held on both December 6, 2016 and January 9, 2017, Ms. Bowman made representations of certain facts which she says ought to have been put before the court by the claimant. For reasons that will be discussed below, I am unable to rely on Ms. Bowman's representations except for statements that were uncontroversial. Thus, what follows is a synopsis of the factual basis for the application primarily taken from the claimant's material.
- [6] Mr. Roca is forty years old. Ms. Rico's age is not disclosed in the evidence. The parties met in Cuba in May, 2008. At the time, Mr. Roca was earning a very good living as a professional volleyball player. Between 2007 and 2013, Mr. Roca's annual income ranged between \$130,000 and \$350,000 (USD), with that income dependent on the contractual arrangements made from time to time. According to the affidavit evidence, the parties began cohabitating within weeks of their first meeting. Ms. Rico would travel with Mr. Roca to various international destinations (Russia, Brazil, Italy and Turkey) during the volleyball season and was involved in negotiating some of the professional contracts. When not travelling, the parties resided together at the Howe Street condominium which had been Ms. Rico's residence when the parties met. It is not clear from the evidence whether Mr. Roca ever held registered ownership in that property.
- [7] About one month before their marriage, the couple opened a haute couture business in Vancouver under the name "Cache Couture Atelier". Mr. Roca says that he played a very active role in the set-up and operation of the business.
- [8] The parties married in Cuba, where they had purchased a property with the intention of building a home together. However, the couple intended to reside primarily in Vancouver. The claimant says that one impetus for the marriage was to have a child. Mr. Roca says that the parties made a joint decision that he retire from his career to live full-time with the respondent in Vancouver and achieve this family life. The couple had some difficulty conceiving and various medical interventions were pursued. Sadly, Ms. Rico suffered miscarriages and no children were born to the couple.

- [9] At some point over the course of the next year, the marriage broke down resulting in Mr. Roca having to leave Canada as he had not obtained permanent residency status. Mr. Roca says that during happier times in the couple's relationship, the application forms for this immigration status were prepared with Ms. Rico's involvement. However, any such application was never submitted to official sources. Other than his involvement in the Cache Couture Atelier business, Mr. Roca did not work in Canada.
- [10] During their time together, the parties enjoyed a very comfortable, if not luxurious, lifestyle. Credit card statements exhibited to Mr. Roca's affidavit show that the large sums of monies were spent by him on the couple's travel, dining out and various other non-essential daily living expenses. The address on the Mr. Roca's credit card statement is the Howe Street condominium.
- [11] According to the evidence, both Mr. Roca and Ms. Rico contributed funds towards the couple's lavish lifestyle. Mr. Roca alleges that some of Ms. Rico's contributions flowed from her financial settlement with a former husband. Hence, as part of his application, Mr. Roca seeks disclosure of any financial settlement, including particulars of spousal support received and all assets retained following the end of that marriage.
- [12] Mr. Roca believes that Ms. Rico sold the Howe Street condominium in 2015 but he has no information on the details of that transaction. Mr. Roca was able to locate some on-line marketing for the property which indicates that the property was listed in April 2016 for \$1,398,000.
- [13] In terms of overall assets involved in this proceeding, Mr. Roca claims an interest in a Mercedes Benz owned by the respondent. Mr. Roca estimates the value of that vehicle to be \$90,000. Other than the real property (two properties in Cuba, both of nominal value and the Howe Street condominium or its sale proceeds), the only other tangible assets disclosed in Mr. Roca's financial statement are his CIBC Wood Gundy account in Canada (valued at \$90,000 as of July, 2016) and a Rolex watch held by the respondent. Mr. Roca also claims an interest in the Cache Couture Atelier business for a yet to be determined amount.
- [14] Presently, Mr. Roca lives in a Havana apartment gifted to him by the late Fidel Castro. Mr. Roca's monthly expenses as of July, 2016 are said to be \$1,341.36. However, Mr. Roca has also prepared a budget reflecting the lifestyle that he enjoyed with the respondent. The monthly expenses in that budget amount to \$9,500 and include such items as lease payments for a vehicle (\$2,500), vacation allowance (\$1,000) and clothing (\$1,700). It is not clear whether this second budget reflects the cost of living in Havana or Vancouver.

Procedural History and Orders made on January 9, 2017

- [15] The procedural history of this action is highly relevant to the outcome of the application.

- [16] Mr. Roca commenced his action on February 18, 2016. A notice of a judicial case conference ("JCC") was filed five days later with that conference to be held on April 4, 2016. Ms. Rico was personally served with these two documents on February 24th. The original notice of family claim does not include a claim for divorce.
- [17] Mr. Roca and his counsel appeared at the April 4th JCC, the former by telephone from Cuba with leave of the court. Ms. Rico did not attend and Mr. Roca was awarded costs of \$500 payable in the cause due to this non-attendance.
- [18] On April 5, 2016, a jurisdictional response was filed by Ms. Rico's present counsel. This response did not form part of the application record but I have viewed the document in the court file. In that response, Ms. Rico disputes that this court has jurisdiction over her in the proceeding; this pleading does not require any further particulars of, or reasons for, the disputed jurisdiction.
- [19] A second JCC was held on May 16, 2016. According to the court's electronic record, an order was made at that conference providing that if the action was not dismissed by July 1, 2016, yet another JCC was to be scheduled. It appears that this order has yet to be drawn and entered.
- [20] On June 15, 2016, the claimant amended his notice of family claim to seek a divorce. The notice of family claim now pleads that the Cuban divorce is not valid and/or recognized in Canada.
- [21] No further steps involving the court were taken until the filing of this application on October 6, 2016. Ms. Bowman says that she has provided the claimant with an unfiled F8 and various other documents.
- [22] The claimant's application came before me on December 6, 2016. Ms. Bowman appeared and objected to the application proceeding. After hearing submissions from the parties, I directed that the application be adjourned to January 9, 2017 and that the further JCC be held on that same day prior to the application. January 9th was chosen to convenience Ms. Bowman who, in any event, appeared by telephone on that day. The JCC proceeded before Mr. Justice Johnston on the morning of January 9th. I was not advised of any orders being made at the conference that might affect the hearing of the claimant's application. This application proceeded in the afternoon of January 9th. The respondent was permitted to make submissions despite not presenting any responsive material to the application. Nonetheless, counsel were advised that I was unable to rely on unsworn statements that were in any way controversial as between the parties.
- [23] As the conclusion of submissions, the following orders were made:

1. The respondent shall pay interim spousal support to the claimant in the sum of \$1,350 CAD, commencing January 15, 2017 and continuing on the 15th of each month thereafter until further order of the court with any cheque or money order payable to the claimant in care of Contreras McLennan Law Corporation. The order is without prejudice to any determination at trial or otherwise on entitlement to or quantum of spousal support including any retroactive support;
2. After March 1, 2017, either party may apply to vary the order with respect to interim spousal support, without having to demonstrate a material change of circumstances;
3. Within 30 days of the date of the order, the respondent shall provide to the claimant the following:
 - a. a copy of respondent's sworn and filed financial statement to be completed in compliance with the SCFR and the respondent's list of documents current to the date of delivery;
 - b. copies of all statements relating to the respondent's investment(s) and/or accounts of every kind, including but not limited to chequing, savings, RRSPs, LIRAs, etc. for January 1, 2014 to present;
 - c. copies of all monthly statements relating to the respondent's credit cards and/or lines of credit of every kind that she has used and/or uses directly or indirectly at any point from January 1, 2014 to the date of this order; and
 - d. a copy of the statement of adjustments related to the sale of the family residence located at 1202 - 1501 Howe Street, Vancouver, B.C.

[24] I reserved my judgment on the balance of the relief sought and also advised the parties that these reasons would explain the basis for the orders made on January 9th.

Discussion

Jurisdictional Issue

- [25] Both the proceeding as a whole and this application in particular are resisted on the grounds that the court has no jurisdiction over the respondent. The respondent has consistently taken the position that she must not attorn to the court's jurisdiction by filing a response to the notice of family claim or any other court related documents. Further, the respondent submits that the court should somehow direct a hearing on the jurisdictional issue, with such a hearing taking place in the Vancouver registry.
- [26] In filing the jurisdictional response, Ms. Rico seeks to avail herself of the remedies under SCFR 18-2. That rule allows a party to:
- a. apply to strike out the notice of family claim or obtain a stay or dismissal of the proceeding; and/or

- b. allege in a pleading filed after the delivery of the jurisdictional response that the court does not have jurisdiction over the party (emphasis added)

[27] Furthermore, SCFR 18-2 (5) provides that:

- (5) If, within 30 days after filing a jurisdictional response in a family law case, the filing party serves a notice of application under subrule (1) (a) or (b) or (3) on the parties or files a pleading or a response to petition referred to in subrule (1) (c),

- (a) the party does not submit to the jurisdiction of the court in relation to the family law case merely by filing or serving any or all of the following:

- (i) the jurisdictional response;

- (ii) a pleading or response to petition under subrule (1) (c);

- (iii) a notice of application and supporting affidavits under subrule (1) (a) or(b), and

- (b) until the court has decided the application or the issue raised by the pleading, petition or response to petition, the party may, without submitting to the jurisdiction of the court,

- (i) apply for, enforce or obey an order of the court, and

- (ii) defend the family law case on its merits.

[28] Thus, the court has no authority to give directions with respect to the conduct of the strike, stay or dismissal application until that application is filed, served and brought before the court: SCFR 18-2(4). Meanwhile, the proceeding continues essentially undefended on the merits with Mr. Roca entitled to pursue any and all remedies available to him under B.C. law.

[29] The respondent has had the opportunity since at least May 5, 2016 to bring an application under SCFR 18-2(4) but has failed do so and offered no justification for this omission other than counsel's interpretation of that rule. The claimant submits that that jurisdictional response is simply a stall tactic by the respondent. I make no finding in that regard but can say that by taking no steps under SCFR 18-2 other than filing Form F78, the respondent exposes herself to having no defence to the interim applications brought by the claimant.

[30] Ms. Bowman submits that the claimant's evidence and submissions should be held to the standard of a without notice application. There is no basis in law for such a finding. The respondent can still avail herself of the remedies under SCFR 18-2 but she should not expect the court, or the claimant for that matter, to be her advocate in this proceeding if no such steps are taken.

[31] Having said all of this, I do not ignore the fact that the court's jurisdiction over this proceeding is contested. As well, there may well be a meritorious defence to Mr. Roca's claims in addition to the jurisdictional response.

Interim Spousal Support

- [32] The interim spousal support award is intended to meet the claimant's basic needs at this time: *Robles v. Kuhn* 2009 BCSC 1163. Although not specifically argued, I will assume that the interim support of \$10,000 per month sought by the claimant reflects a non-compensatory component: *Bracklow v. Bracklow* [1999] S.C.J. No. 14. In the absence of reliable evidence of the respondent's income, I am unable to determine support in accordance with the SSAG. Nevertheless, based on the claimant's evidence of the lifestyle enjoyed by the parties during the marriage, I have determined that Ms. Rico has the ability to pay the monthly amount of \$1,350. Furthermore, on the question of entitlement, the only reliable evidence provided is that Mr. Roca gave up a lucrative career for the sake of the marriage and is now much worse off financially. It may be that the ordered financial disclosure and any responsive pleading or affidavits from the respondent will allow the court to re-visit either quantum or entitlement to the interim support. Ms. Rico is not prejudiced by the current award as she may seek reimbursement from Mr. Roca's Canadian investment account for any support later determined to have been wrongfully paid. Mr. Roca should not be required to liquidate assets to meet his needs pending trial or final order: *Camp v. Camp* 2004 BCSC 1096.
- [33] The claimant seeks a spousal support order pursuant to both the Divorce Act and the Family Law Act. The order for interim support is made pursuant to both statutes.

Declaration of Family Property and Interim Distribution of Property

- [34] A fair hearing on the merits of this part of the claimant's application may need to await delivery of the respondent's filed financial statement. This aspect of the notice of application is adjourned generally, with liberty to re-set for hearing after March 1, 2017. The claimant may also wish to consider whether the declaratory relief should be sought from a justice of this court.

Information regarding the Respondent's financial settlement with her former spouse

- [35] Ms. Rico's former spouse is not a party to the proceeding and received no notice of the claimant's application. I decline to adjudicate upon this aspect of the claimant's application without giving that individual an opportunity to be heard. The orders sought clearly impacts this individual's privacy rights. Accordingly, the relief sought in items 4, 5 (d), 5 (e) (i) is also adjourned generally, with liberty to re-set the relief for hearing after giving notice of the application to the former spouse in accordance with the SCFR.

Other Financial Disclosure

[36] The respondent has been ordered to provide financial disclosure beyond a filed F8. I reserved judgment with respect to orders sought for an accounting of funds from the sale of the Howe Street condominium and a listing of assets held or disposed of by the claimant since January 1, 2014. It may be that such orders will be redundant, depending on the content of the respondent's F8 and the fulsome disclosure expected. These aspects of the notice of application are also adjourned generally, with liberty to re-set for hearing after March 1, 2017.

Other Issues raised

[37] On January 9th, Ms. Bowman suggested that I should not hear the application as I had presided at a JCC held in the proceeding last year. While no authorities were cited, SCFR 7-1 (17) answers the submission. That rule allows the presider at a JCC to be seized of all applications brought in the proceeding. Thus, the rules specifically contemplate the same Master presiding at both a JCC and any or all subsequent applications. It would be entirely contrary to the rules to require that a presider who conducted the JCC be recused from the hearing of subsequent applications.

[38] Further, in addition to asking that the court "direct" the hearing of the jurisdictional dispute, the respondent requested an order or direction that such a hearing occur in the Vancouver registry. A Master has no authority to order the transfer of a proceeding or part thereof to another registry on her own motion or at the informal request of one party. Such an order can only result from an application brought pursuant to SCFR 10-6 or a consent order made between the parties. The claimant does not consent to the transfer of any part of the proceeding at this time.

Costs

[39] Due to oversight, the claimant did not seek costs in his notice of application. However, Mr. Roca's costs claim was raised in both communications exchanged between counsel and at the December 6, 2016 hearing. In any event, SCFR 16-1(9) does not require that costs be claimed in the notice of application in order for such an award to be made. In this case, the claimant was clearly successful even though some aspects of the relief have yet to be adjudicated upon. The claimant is awarded his costs in the cause for the preparation and attendance at the application for a full day on each of December 6, 2016 and January 9, 2017.

"C. P. Bouck"

Master C.P. Bouck

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