
CANADA / JUDGMENT

Brady v. Kobylt

2020 BCSC 1953

COURT

Supreme Court of British Columbia

DECIDED

9 December 2020

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2020 BCSC 1953 Brady v. Kobylt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brady v. Kobylt,

2020 BCSC 1953

Date: 20201209

Docket: E181097

Registry: Vancouver

Between:

Ryan Brady

Claimant

And

Natalia Kobylt

Respondent

Before: The Honourable Madam Justice W.A. Baker

In Chambers

Reasons for Judgment

Counsel for the Claimant:

J. F. Brown

Counsel for the Respondent:

S.S. Parhar

Place and Date of Hearing:

Vancouver, B.C.

November 24, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 9, 2020

I. Introduction

- [1] This application arises in the context of a family law dispute. The claimant says that in 2020 the parties came to an agreement to sell a property which they purchased jointly in 2015. He seeks to enforce that agreement. The respondent denies there was an enforceable agreement and, in the alternative, argues that if there was an agreement made, it should be set aside as it is unfair.
- [2] The parties commenced living together in 2014, and separated in 2017. It was not a long relationship, and they were never married. The property at issue is the only real asset they share.

II. Issues

[3] The issues which arise on this application are:

- a) Was an enforceable agreement reached between the parties in the summer of 2020 with respect to the listing and sale of the property?
- b) If yes, should the agreement be enforced or set aside?

A. Was an enforceable agreement reached between the parties in the summer of 2020 with respect to the listing and sale of the property?

- [4] Both parties were represented by counsel throughout the discussions around the alleged agreement. At no time did discussions take place directly between the parties.
- [5] In 2019 counsel for Mr. Brady first raised his desire to sell the property the parties co-owned, located at 2142 Patricia Avenue, Coquitlam. This is the property which is the subject of this application. Counsel for Mr. Brady waited for a response until early 2020, and on January 8, 2020 advised that he would be bringing on an application for sale in February if no agreement could be reached.
- [6] The matter was set for trial at the end of June 2020.

- [7] Before the application could be heard, the COVID 19 pandemic happened, and the application could not proceed. On May 6, 2020 counsel for Mr. Brady again pressed counsel for Ms. Kobylt to agree to list the house for sale, failing which Mr. Brady would apply to have the application heard by written submission.
- [8] On May 14, 2020 counsel for Mr. Brady wrote to Ms. Kobylt's counsel stating, "If we can resolve the issue of sale of the house by consent, my client is willing to share reasonable and usual costs related to the sale."
- [9] On May 14, 2020 counsel for Ms. Kobylt wrote to Mr. Brady's counsel and advised the following, "my client will agree to place the house for sale, on the condition that all costs pertaining to the sale, such as but not limited to real estate fees, maintenance, cleaning, and all other incidental costs are shared equally by the parties and each will pay their share of such costs when due. The trial will be adjourned until after the house is sold. The proceeds will be held in trust pending resolution."
- [10] On May 21, 2020 counsel for Mr. Brady wrote to counsel for Ms. Kobylt stating, "We are agreeable to listing the house for sale and adjourning the trial until the sale. I have taken the liberty to draft some terms regarding the sale. Please let me know if they are acceptable or if you want any further changes." Counsel then set out nine detailed terms, including:
- a) Para. 7 - that the parties will share equally any agreed to expenses for necessary repairs or other incidentals needed to ready the home for sale, and
 - b) Para. 8 and 9 - that real estate commission and other normal fees and disbursements would be paid out of sale proceeds, following which the net sale proceeds would be held in trust with counsel for Mr. Brady pending further agreement or court order.
- [11] On May 26, 2020 counsel for Ms. Kobylt wrote to Mr. Brady's counsel advising that "all items except for 8 and 9 are agreeable". She required certain additional charges to be included in paragraph 8, and wanted the net sale proceeds to be held in her trust account. She also required Mr. Brady to remove all of his personal belongings at his own cost, and to file a requisition adjourning the trial by no later than June 5, 2020.
- [12] On May 28, 2020 counsel for Mr. Brady replied that all the changes proposed by Ms. Kobylt were acceptable.
- [13] On June 10, 2020 counsel for Ms. Kobylt sent Mr. Brady's counsel photographs of his belonging which were to be picked up, and suggested a realtor with whom to list the property.
- [14] On June 18, 2020 counsel for Mr. Brady suggested two alternative realtors, and asked whether Ms. Kobylt was interested in sharing in paying for a company to remove the junk which he says was shown in the photographs.

- [15] On June 23, 2020 counsel for Ms. Kobylt confirmed that the realtors proposed by Mr. Brady were acceptable and declined to share the cost of removing any of the objects shown in the photographs.
- [16] On June 30, 2020 counsel for Mr. Brady provided Ms. Kobylt's counsel with a listing agreement for her client's signature.
- [17] On July 17, 2020 counsel for Ms. Kobylt wrote to Mr. Brady's counsel stating, "My client intends to proceed with the sale. Once the house is in a condition for sale, it will be listed." She also reiterated that Mr. Brady had to remove his belongings. She then introduced a new term in proposing that Mr. Brady provide her client with \$2,000 to be held in trust to pay any required expenses, to be spent only after both parties agree with any proposed expenses.
- [18] On August 24, 2020 counsel for Mr. Brady confirmed that his belongings had all been removed, and noted that it was time to list the property for sale. She asked for confirmation that Ms. Kobylt had signed the listing agreement. She did not confirm an agreement for Mr. Brady to forward \$2,000 in trust.
- [19] On August 29, 2020 counsel for Mr. Brady followed up, again seeking confirmation that Ms. Kobylt was co-operating with the realtor and listing the house for sale.
- [20] On September 1, 2020 counsel for Mr. Brady learned that Ms. Kobylt had retained new counsel, and provided details of the agreement to list the property to the new counsel. Counsel confirmed that, "Mr. Brady has removed all of his belongings as agreed and filed the requisition to adjourn the trial."
- [21] On September 24, 2020 counsel for Mr. Brady wrote to counsel for Ms. Kobylt asking for confirmation by October 1, 2020 that Ms. Kobylt would be proceeding with the sale of the home, failing which this application to enforce the sale would be brought. No response from counsel for Ms. Kobylt arrived by October 1, 2020.
- [22] There is no question that an enforceable agreement can be reached through correspondence between counsel: *Bate v. Smith*, 2017 BCSC 1261. If the parties have indicated their intention to contract and the essential terms of the contract, in a form which would be understood by an objective reasonable bystander, the court will find an enforceable agreement has been reached: *Lecroix v. Loewan*, 2010 BCCA 224, *Johnson v. Johnson*, 2015 BCSC 1783.
- [23] On May 21, 2020 counsel for Mr. Brady sent an email to Ms. Kobylt's counsel setting out the essential terms of the agreement, which included an agreement to adjourn the trial in exchange for Ms. Kobylt's agreement to list the house for sale and hold the proceeds in trust pending further agreement or court order. Additional mechanical terms were included in the May 21, 2020 email, including an agreement of both parties to share the expenses for repairs or other incidentals needed to ready the house for sale. A few minor changes were requested by counsel for Ms. Kobylt on May 26, 2020, all of which were agreed to by Mr. Brady on May 28, 2020.

- [24] The later suggestion by Ms. Kobylt that Mr. Brady provide her with \$2,000 in trust is supplemental to the agreement reached on May 28, 2020. As of May 28, 2020 there was in place an agreement to share costs equally. There was no agreement to pre-pay these expenses. Mr. Brady's failure to accede to this new term proposed by Ms. Kobylt does not in any way vitiate the May 28, 2020 agreement.
- [25] Ms. Kobylt argues that there was no consideration for the agreement given. I disagree. Mr. Brady agreed to and did adjourn the trial date, which was set for the end of June 2020. Ms. Kobylt agreed to list the property for sale. An agreement to list a property is not an agreement to agree. It is enforceable as consideration for the agreement reached. I find that consideration for the May 28, 2020 agreement was given by both parties.
- [26] Ms. Kobylt argues that she did not agree to list the property for sale, that she was very ill during the time the pertinent email were exchanged, and that she was relying on her father who did not have actual authority to instruct her lawyer. Her father provided an affidavit where he states:

With all of Natalia's health issues in and around May 2020, she was not in any state to make decisions. Regretfully, on May 25, 2020, I sent an email to Natalia's former lawyer, Ms. Polina Futula from my email account, namely kobylt@shaw.ca approving the sale of her property. I also ended up signing Natalia's name at the bottom of the email. I sent this email with the consent or knowledge of Natalia or even my wife.

- [27] The email sent to Ms. Futula was not attached to Mr. Kobylt's affidavit, and there was no affidavit from Ms. Futula. Even if I accept that on May 26, 2020, when Ms. Futula sent an email requesting changes to the agreement, Ms. Futula was acting on instructions from Ms. Kobylt's father, the email correspondence does not end there. It continues on through July, and Ms. Futula continued to affirm the agreement on behalf of her client. She engaged with counsel for Mr. Brady on the selection of the realtor, the removal of Mr. Brady's things from the property and, presumably, the adjournment of the trial. On July 17, 2020 Ms. Futula wrote to Mr. Brady's counsel confirming, "My client intends to proceed with the sale. Once the house is in a condition for sale, it will be listed."
- [28] There is no evidence before the court that Ms. Futula was acting without her client's consent from May until July 2020. I simply cannot accept the argument that Ms. Kobylt was not aware of the agreement reached in May 2020, or that she did not consistently confirm the agreement right up until she decided to introduce a new term on July 17, 2020.
- [29] I find that as of May 28, 2020 there was in place an enforceable agreement between the parties on the terms outlined in the emails noted above dated May 21, 26 and 28, 2020.

B. Should the agreement be enforced or set aside?

- [30] Ms. Kobylt relies on s. 93 of the Family Law Act, S.B.C. c. 25 as authority to set aside the agreement. Section 93 applies if the spouses have a written agreement in place respecting division of property and debt. The agreement before me is not with respect to division of property or debt. The agreement before was to convert real property to cash, pending further agreement or orders on division of property or debt. I find that s. 93 of the FLA has no application to the agreement before me.
- [31] Ms. Kobylt argues that the agreement should be set aside because she was not in direct contact with her lawyer when the agreement was formed. As I have set out already, I do not accept Ms. Kobylt's evidence on this point. I find that she knew the agreement had been reached, and continued to affirm it up until July 17, 2020. Mr. Brady adjourned the trial date in reliance upon Ms. Kobylt's agreement. Her assertion that she did not know about the agreement is not accepted, and cannot be a basis upon which to vary the agreement.
- [32] Ms. Kobylt argues that the agreement is unconscionable. She relies on *Jasinski v. Jasinski*, [2006] BCJ No. 1325, where the court notes that the two common indicia of unconscionability are where there is improvidence and an inequality of bargaining power, and where the agreement is objectively unfair.
- [33] I do not accept that the agreement is improvident or there was an inequality of bargaining power. Both sides were represented by counsel, Ms. Kobylt suggested changes to the agreement which were accepted by Mr. Brady, and the property represents the sole family asset of any value, which will have to be distributed in this family proceeding. It is not improvident to list the property for sale, to crystalize the value of the asset, followed by a later agreement on its division.
- [34] Similarly, I cannot agree that it is objectively unfair to list the property for sale. Before me, Ms. Kobylt argued that she paid the whole down payment and virtually all the mortgage payments, and therefore has a greater interest in the property. She argues that she is not healthy and needs to continue to live in the property which is close to her parents. Mr. Brady provided evidence which appears to contradict Ms. Kobylt's position on who paid the mortgage payments. There is a dispute between the parties on their relative contributions to the property. However, that is a dispute that I do not need to resolve on this application.
- [35] As is the case in many family disputes, the family property is sold even though one party hoped to keep it. However, in the case before me, the time for Ms. Kobylt to argue that she had a greater interest in the home, or had some other compelling reason to maintain the home, was before she entered into the May 28, 2020 agreement. She appears to have changed her mind about wanting to sell the home. However, her subjective change of heart does not make the agreement objectively unfair.
- [36] I find that the May 28, 2020 agreement should not be varied or set aside.

III. Conclusion

- [37] I declare that the parties reached an agreement to list for sale the property at 2142 Patricia Avenue, Port Coquitlam, BC.
- [38] I order the agreement between the parties to be enforced on the terms set out in paragraph 2 of the applicant's Notice of Application filed October 13, 2020.
- [39] Subject to any submissions on costs the parties wish to make, I order costs in the cause to the applicant.

"Baker J."

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