
CANADA / JUDGMENT

Cantelon v. Wall

2015 BCSC 810

COURT

Supreme Court of British Columbia

DECIDED

21 April 2015

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2015 BCSC 810 Cantelon v. Wall

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cantelon v. Wall,

2015 BCSC 810

Date: 20150421

Docket: 12-3058

Registry: Victoria

Between:

John William Arthur Cantelon

Claimant

And:

Annette Susan Wall

Respondent

Before: The Honourable Mr. Justice MacKenzie

Oral Reasons for Judgment

(In Chambers)

Counsel for the Claimant:

C. Murray

Counsel for the Respondent:

B. Pearce

Place and Date of Hearing:

Victoria, B.C.

April 20-21, 2015

Place and Date of Judgment:

Victoria, B.C.

April 21, 2015

- [1] THE COURT: Mr. Cantelon, the claimant, and Ms. Wall, the respondent, were never married. They were, however, in a relationship since shortly after they first met sometime in 1977.
- [2] What kind of relationship is hotly contested and depends on which party is believed when they describe their relationship. Mr. Cantelon says it was a long-term marriage-like relationship. Conversely, Ms. Wall says that while they were together and shared a home for several years, they were independent and were never in a marriage-like relationship.
- [3] As a result, Mr. Cantelon filed a notice of family claim on August 31, 2012, under the Family Relations Act involving property claims pertaining to Ms. Wall's pension, RRSP, and investments. Ms. Wall responded and counterclaimed, seeking a declaration that Mr. Cantelon owes her \$150,000 she says she loaned him in 2011 as part of what she submits was a full and final settlement between them pertaining to all division of property issues.
- [4] Today, however, Ms. Wall has three applications before the court. She seeks these specific matters to be heard and decided pursuant to the Supreme Court Family Rule 11-3, on the basis of affidavit evidence. These three applications were filed separately: the first, November 24, 2014; the second, December 17, 2014; and the final one, January 2, 2015, all seeking different relief.
- [5] Moreover, in the first application, Ms. Wall had applied to have the trial that was set for February 16, 2015, set for five days, be adjourned. In due course it was. Whether it was because the five days set aside was not enough time, or whether it was because I am told Ms. Wall failed to attend for an examination for discovery, or whether it was because of the unavailability of either counsel or one of them, I do not know. In any event, the trial was adjourned and is now set to commence July 13, 2015, for seven days.
- [6] Turning to the present applications by Ms. Wall, the various orders sought by her include:
 - (1) a declaration that the claimant is not a spouse as defined by either the Family Relations Act or the Family Law Act, the latter legislation now relevant in this proceeding because this morning I allowed the claimant to amend his notice of family claim to seek relief under the FLA;

- (2) a declaration that Part 5 of the FLA does not apply to either party; and
- (3) that Mr. Cantelon's claims be dismissed in their entirety or, in the alternative, the respondent's response and counterclaim be amended.
- [7] The claimant consents to this last application made by the respondent but does not, however, agree that these other application issues can be determined by way of a summary trial.
- [8] On this point, Mr. Cantelon submits that the critical question to be determined in this litigation, as does Ms. Wall, in fact, is when did the parties separate or cease to be living in a marriage-like relationship. In this regard, the parties are years apart in what each says was the date of separation. Mr. Cantelon submits they were in a marriage-like relationship until they separated September 16, 2011, whereas Ms. Wall says they separated in July 2007.
- [9] This question is critical because of the statutory limitation period under the Family Law Act, as well as because of the definition of spouse under both the FRA and the FLA. In support of her submission for a summary determination of these issues, Ms. Wall says if the jurisdictional questions were answered first, the length of trial would be reduced. I agree that that is a likely probability, but the issue is whether these particular questions can be answered on a summary basis. Moreover, with respect to the alternative submission by the respondent with respect to cross-examination of the parties on their affidavits, given the length of the affidavits and the contradictory evidence contained therein, how much shorter the hearing would be if there was cross-examination as opposed to a conventional trial is difficult to say.
- [10] Be that as it may, Mr. Cantelon submits that even though speed and efficiency are important factors to consider on this type of application, it would be inappropriate for this court to attempt to decide these fundamental questions of whether he can continue to advance the claims he has made, as well as under what particular legislation he can claim relief if this determination was based solely on affidavits where, in his submission, there is clearly a head-on conflict in the affidavit evidence. He submits that the court would be unable to determine which of the parties is more credible with respect to the date of separation, and the only fair and proper way to obtain a just result is to have a conventional trial.
- [11] In response, Ms. Wall acknowledges that there are dramatically conflicting versions of the type of relationship these parties were in, as well as when they separated, if they are, in fact, to be found to have been in a marriage-like relationship. Nevertheless, even with the parties' credibility being front and centre in all aspects of this litigation, Ms. Wall submits that these issues could be satisfactorily disposed of by way of a summary determination. She quite properly, through counsel, reminds the court that in *Inspiration Management*, 36 B.C.L.R. (2d) 202, Chief Justice McEachern encouraged trial courts not to be bashful or reluctant to deal with a matter on a summary basis if the circumstances are such that the necessary facts could be found to decide both issues of fact and law, and that a just decision could be reached.

[12] Summary trials in family proceedings are governed by Rule 11-3(15). There is no necessity for me to repeat it here.

[13] Pursuant to that rule, there is no doubt that where the court is able to find the facts necessary to decide the issues before it and it is not otherwise unjust to decide the matter summarily, the court should give judgment. Chief Justice McEachern again emphasized in *Mariotto v. Waterman*, 32 B.C.L.R. (3d), with respect to Rule 18 applications, as they then were, instead of Rule 9-7 or 11-3 in the family law area:

Where possible it is always to be hoped that judges will give judgment and I repeat that admonition [here].

[14] At the same time, in my view, the primary concern is achieving a just result.

[15] As Justice Williams stated in *Leisure Aquatics*, 2012 BCSC 1202, at paragraph 24:

The parameters with respect to the summary trial procedure are well-established. This is a legitimate mode of trial in appropriate circumstances. Where the court is able to make the necessary findings of fact on the material filed, even if there are conflicts in the evidence, that should be done. However, where the necessary findings cannot be made because of quite fundamental conflicts that cannot be fairly resolved, the court may conclude that the matter is not suitable for disposition under this rule.

[16] The question therefore is whether the conflicts in the evidence relate to essential issues that cannot be resolved on the evidence.

[17] As Justice Ker said in *Fraser v. Abma*, 2012 BCSC 1429, where issues of credibility go directly to the foundation of either the plaintiff's or the defendant's case, or the claimant and the respondent's in this case, the resolution of which requires findings of credibility to be made or preferring one view of the evidence to the other, with that head-on conflict, the court might very well be unable to proceed by way of summary trial.

[18] There is no question that in the present case, because of the provisions of s. 198(1)(b) of the FLA, Mr. Cantelon's claim under this Act depends on whether or not the parties lived in a marriage-like relationship and whether they separated in 2011 or in the year 2007. If Ms. Wall's evidence is accepted and Mr. Cantelon's rejected, and the court concludes they were never in a marriage-like relationship as Ms. Wall now claims or, if they were, they separated in 2007, Mr. Cantelon's claim under the FLA will be statute barred by the two-year limitation period.

[19] Ms. Wall also says that if the court accepts her evidence that they never were in a marriage-like relationship, Mr. Cantelon would also not meet the definition of spouse under the FRA, hence the first of these three summary applications.

- [20] Moreover, Ms. Wall argues that the affidavit evidence and the email evidence between the parties and others will establish that she and Mr. Cantelon reached a full and final settlement in 2011 pertaining to the division of their property, including RSP and pension issues, as evidenced by the payment by her of some \$512,000 for Mr. Cantelon's one-half share of a home they purchased together in 2002.
- [21] On the latter point, Mr. Cantelon categorically denies there ever was a final and complete settlement of the division of property, particularly the issue of pensions, now one of the primary issues in his claim.
- [22] With respect to the date of separation and the nature of their relationship in general, he submits it is beyond dispute that he and Ms. Wall were in a marriage-like relationship which continued until they separated in 2011, and any assertions to the contrary are simply untrue. Ms. Wall says, as emphatically, that that allegation or submission is without merit.
- [23] On this point, during submissions, reference was made to several emails which Ms. Wall says support her position. However, in my view, these documents can be viewed as relatively equivocal and can be utilized, in my view, by either side to advance their respective positions with respect to the critical issues in this litigation.
- [24] In this regard, as far as the documentation is concerned, I am of the view it is as contradictory of the parties' position as it is corroborative. In some respects, they support Mr. Cantelon's submission, especially when counsel on his behalf refers to the tax returns where reference is made to common-law spouse on the title page of the tax return after the alleged separation year of 2007. On the other hand, Ms. Wall submits that Mr. Cantelon signed off on her pension when she retired from the government, evidence she submits that supports her position that there was indeed a final settlement of the division of property. In addition, Mr. Cantelon submits that the affidavits of the supporting witnesses are contradictory, leaving aside what weight can be given to any of them.
- [25] Finally, Ms. Wall submits through counsel that there is no dispute that the parties had separate bedrooms after 2007 and infers this should be dispositive of the issue. Mr. Cantelon, in his affidavit material, replies that while this is true, it was Ms. Wall's idea and it was reflective of his health issues at the time and the fact that, as far as he submits, Ms. Wall did not view such an arrangement as contrary to a committed marriage-like relationship.
- [26] Perhaps all that really needs to be said with respect to this application for a summary determination of these issues is if I simply quote from Ms. Wall's reply to Mr. Cantelon's January 16, 2015, affidavit. At paragraph 18 of her affidavit, Ms. Wall states:

I dispute each and every statement referencing the status of our relationship in the Claimant's Affidavit sworn January 16, 2015 as being untruthful and inaccurate.

- [27] When the totality of the material is considered, there is, in my view, indeed an overwhelming head-on conflict between the parties on the fundamental and crucial issues at play in this litigation.
- [28] While I am clearly mindful of the admonition and comments of Chief Justice McEachern in *Inspiration Management* urging the court to embark upon a summary determination of an issue whenever a just determination can be achieved, as well as the recent comments of the Supreme Court of Canada in *Hyrniak*, 2014 SCC 7, the conflicts in the evidence between Mr. Cantelon and Ms. Wall in this case, on all fundamental matters, are dramatic and will require the trier of fact to clearly reject or accept the evidence of one party over the evidence of the other, assuming the trier of fact is able to conclude who to believe.
- [29] In my view, the only way the diametrically-opposed evidence of these parties can be resolved in a just and fair manner is for there to be a conventional trial with both parties providing viva voce testimony before the trier of fact.
- [30] While Rule 1-3(2) enshrines the principle of proportionality and provides that the object of the Supreme Court Rules is for the just, speedy, and inexpensive determination of cases, in the present circumstances I am unable to resolve the head-on conflicts in the affidavit evidence and, as such, would be unable to find the facts necessary to decide the issues of fact and law necessary to determine the case and, moreover, given the totality of the circumstances, I am of the opinion it would be unjust to determine this case by way of a summary trial.
- [31] So the three applications by Ms. Wall for summary determination are dismissed.
- [32] By consent, Ms. Wall's response to the family claim and her counterclaim can be amended as requested in her notice of application filed, I believe it was, January 2, 2015.
- [33] So this matter will proceed to trial as scheduled, July 2015. I am not seized of the matter; in fact, I will be out of the jurisdiction at that time.
- [34] As far as trial procedures are concerned, I would simply suggest that counsel attend before the trial judge and canvass the obvious suggestion which, in my humble opinion, makes sense as put forward by Ms. Murray that the jurisdictional issues, to use that phrase as I have already referred to it, on whether there is a limitation period, whether Mr. Cantelon's claim under the FLA is statute barred or time barred would make sense, and once that determination is made, the trial can proceed or be dealt with otherwise.
- [35] Yesterday, Ms. Murray also submitted that it would be of some practical benefit if, pursuant to 11-3(17)(b) and (c), I set some time for getting examinations for discovery completed, and I think that make sense, Mr. Pearce. I am just wondering if either one of you had any submissions with respect to what would be a reasonable period of time from today's date to do that?

[36] MS. MURRAY: My Lord, I would submit that examinations for discovery be completed within one month of today's date. I do note that I will be out of the country from May 23rd to May 31st, so that would fall within that timeframe.

[37] THE COURT: Seems to be a reasonable period of time. Mr. Pearce, is that okay with you?

[SUBMISSIONS RE EXAMINATIONS FOR DISCOVERY]

[38] THE COURT: I am prepared to accommodate you. It is set for July 15th. On or before June 5th, is that okay, Ms. Murray?

[39] MS. MURRAY: That's agreeable, My Lord.

[40] THE COURT: If you can get it done any time before then --

[41] MR. PEARCE: Understood.

[42] THE COURT: -- obviously that makes eminent sense. Okay. Are there any submissions on costs?

[SUBMISSIONS ON COSTS]

[43] THE COURT: Balancing the competing interests here, notwithstanding the success on this application, I will order that costs be in the cause.

"B.D. MacKenzie, J."

The Honourable Mr. Justice B.D. MacKenzie

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