
CANADA / JUDGMENT

E.T.C. v. F.N.C. et al.

2005 BCSC 1330

COURT

Supreme Court of British Columbia

DECIDED

23 September 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.T.C. v. F.N.C. et al.,

2005 BCSC 1330

Date: 20050923

Docket: E040196

Registry: Vancouver

Between:

E.T.C.

PLAINTIFF

And

F.N.C. and

A.[] Ltd.

DEFENDANTS

Before: The Honourable Mr. Justice Williamson

Reasons for Judgment

Counsel for the Plaintiff

Pamela Boles

Counsel for the Defendants

Kerry-Lynne Findlay, Q.C.

Donna Yamazaki

Date and Place of Hearing:

September 12 and 14, 2005

Vancouver, B.C.

- [1] This is one of those matrimonial matters which appears to be off the rails. There have been many counsel involved. There have been many applications. There are voluminous affidavits. There are many conflicts in those affidavits. The application before me over one and half days involved four Notices of Motion seeking more than 20 orders plus costs. Counsel are trenchant in their opposing submissions.
- [2] The parties were married in 1992. They separated in 2003 or 2004, for even the date of that event is disputed. There is one child, a daughter, born of the marriage in 1993.
- [3] The defendant father is aged 70 and retired. For many years he ran a company called A.[] Ltd. ("A.[] Ltd"), the corporate defendant. It has at least four franchises, two of which are run by his son from a previous relationship. Prior to the separation, and for a short period thereafter, the plaintiff mother, who is about 17 years younger than her husband, claims to have managed one of the franchises through a company called A.[].
- [4] This claim, like many others, is challenged by the defendants who say she ran that franchise nominally, but did not in fact manage it. Further, they say her involvement was detrimental to the franchise.
- [5] The defendant also is the sole shareholder of a real estate holding company in Calgary, U.[] Ltd.
- [6] Each side has been represented by various counsel. There have been some tentative agreements. Each side says the other has breached those agreements. Each side also claims the other has wrongly taken money out of the companies. Each claims the other is being untruthful in affidavits.
- [7] Notably, on October 21, 2004, a Consent Order of this court was filed which attached Minutes of Settlement. These provided that the plaintiff would have exclusive occupation of the main floor suite of the matrimonial home, a building which also includes two self-contained suites and an office. The agreement included clauses that the defendant would occupy one of the suites paying rent at \$1,450 per month to the mother, and the mother would continue to be entitled to collect rent from the other suite, a basement suite, in the amount of \$650 per month.

- [8] It also provided for a number of other things including that the father would pay the Y.[] School tuition and other expenses for the child and that the monthly rental payments received by the mother could be credited by the future trial judge towards the family support obligations of the father. The father was to pay the mortgage payment on the family home which was set at the time to be \$1,700 per month. I conclude that this arrangement was to be in lieu of child or of interim child or spousal maintenance.
- [9] The agreement also specified that the mother would have the use of a relatively new van which was the property of A.[] Ltd.
- [10] Each side says that in one way or another, the other has not lived up to this agreement.
- [11] This is an interim application. The disputes which are apparent in this application cannot be resolved summarily. They will have to be resolved at trial or by settlement.
- [12] The first of four Notices of Motion before me, dated May 26, 2004, is an application by the plaintiff for an order that the mother should be reinstated as the manager of the A.[] Ltd franchise located on K.[] in Vancouver.
- [13] I decline to make this order. There is much dispute about the performance of the mother as manager of that franchise. Given the acrimonious relationship, it does not seem prudent to have the mother managing one of the two franchises of A.[] Ltd which are run by either the defendant or his son. There is some evidence that the franchise is doing better since the mother ceased to be the manager. There is no evidence that it is doing worse. I find it is to the benefit of all the parties that the status quo continue and the mother not be reinstated as manager.
- [14] That Notice of Motion also seeks an order that the defendants provide a full accounting of the business activities of that franchise as well as the franchise at W.[] Avenue. There is great dispute about what should be involved. The wife seeks "every scrap of paper". I think this unrealistic. The order will go that there will be a full accounting of business activities of the two franchises including financial statements and banking records. If an accountant or similar expert retained by the wife needs further information, that accountant will have the right to enter the premises of either franchise to review sales documents, invoices or other paper or computer files at those locations without further order of the court.
- [15] The second Notice of Motion dated December 3, 2004, seeks many orders on behalf of the plaintiff. Some of them, however, were not pursued on this application. The first is that until further order of the court the defendant pay interim spousal support and child support based upon an imputed income of \$250,000 per annum. I decline to make this order. It is inconsistent with the agreement made earlier by the parties. There is, however, some suggestion that the father has not lived up to his obligations.
- [16] In the circumstances, I am going to make the following order. First, the mother with continue to reside in the matrimonial home. Second, she will have the right to rent out the two suites and to keep the income from those two suites in lieu of interim spousal and child

support. Third, she will allow a representative of A.[] Ltd to inspect the suites and to make any repairs which may be necessary to facilitate their rental. Fourth, there will be an order that the father will pay the ancillary expenses which he claims he has been paying. These are:

1. the mortgage on the matrimonial property,
2. the property taxes,
3. the MSP premiums for all three members of the family,
4. the tuition for the child's private school,
5. the child's school uniform and cafeteria expenses,
6. the child's math tutor,
7. the child's piano lessons, and
8. her cellular telephone bill.

Further, the father and the corporate defendant will provide the Honda van for the mother, including maintaining and repairing the vehicle, paying the vehicle insurance, and signing any necessary documents or transfers. The other van in possession of the mother will be returned to the company.

[17] In this way, I am satisfied that the mother and child will be provided for reasonably pending determination of these matters.

[18] The plaintiff further seeks in this Notice of Motion an order that the defendants do all necessary things for the plaintiff to obtain a mortgage or some other type of financing up to \$60,000 to be secured against the former matrimonial home to give her some funds to hire the necessary experts to conduct this case. I recognize that an order such as this is not often made although counsel agree that I have the discretion to so order. I find, in the circumstances of this case, which are somewhat unusual, such an order is appropriate. I say so because it is apparent that the defendants have used the corporate defendant as a vehicle for paying similar expenses on the part of the defendants. In other words, they have used a presumed family asset to fund one side of the lawsuit. The order sought by the plaintiff will go.

[19] The plaintiff seeks an order that the defendants produce an accounting of income and expenses associated with two other franchises of A.[] Ltd, one in Port Coquitlam and one in Richmond. The defendants claim this has been done. I therefore order that the defendant review this matter and produce any such documents that have not yet been provided.

[20] I turn to a Notice of Motion dated March 30, 2005 by which the defendant seeks a number of orders with respect to documents that have not already been produced. For example, the defendant seeks an order that the plaintiff forthwith produce all documents in her

possession or control related to a certain numbered company "that has not already been produced". The Notice of Motion seeks a similar order in paragraph one concerning [] B.C. Ltd., in paragraph three various documents of ARTC, and in paragraphs six, seven and eight, documents concerning bank records, property and investments or shareholdings "that have not already been produced". Those orders will go.

- [21] The defendant also seeks an order that the plaintiff produce a list of tenants for the suites which I have referred to above, including tenancy agreements if any, "that have not already been produced" together with an accounting of revenues for 2003 to present. That order will go.
- [22] The defendant seeks an order that the plaintiff produce copies of divorce proceedings commenced by the plaintiff in Alberta and any related certificates of pending litigation or like caveats. I decline to make this order. The individual defendant is a party to that proceeding and as such has access to any documents filed in court or in the equivalent of the Land Registry Office in Alberta.
- [23] The defendant seeks an order that the plaintiff produce communications between her and one Vicky Go, apparently a bookkeeper who looked after the books of the franchise when it was managed by the plaintiff. That order is not opposed by the plaintiff as long as it excludes any documents that would be privileged because they were produced at the direction of counsel in this litigation. Subject to that caveat, if it need be said, the order will go.
- [24] Finally, I turn to a Notice of Motion filed March 30, 2005 in which the defendant seeks a number of things. First, the defendant seeks an order that the child of the marriage not be removed from the jurisdiction of this court without leave of the court or written agreement between the parties. There is no evidence to suggest that this is contemplated and I decline to make the order.
- [25] Second, the defendant seeks leave to amend their counterclaim. The plaintiff does not oppose this. That order will go by consent. Thirdly, the defendant seeks an order that the plaintiff's signature be dispensed with respect of the removal of the mortgage on the former matrimonial home located on G.[] Sreet in Vancouver. I decline to make such an order. There is a great deal of distrust between the parties and it would not be appropriate to order the dispensing of such a signature.
- [26] Fourth, the defendant seeks an order that certain boxes of documents of the day-to-day business of A.[] Ltd which are located in the plaintiff's counsel's office be delivered to the defendant's place of business forthwith. The plaintiff says that these documents have been available to the defendants. There will be an order that the boxes will be delivered to the defendants' counsel forthwith at the expense of the defendant and will be returned within a reasonable period, undamaged and unaltered, to counsel for the plaintiff after they have been reviewed by the defendants' financial experts.

[27] Each side seeks costs. I decline to order costs at this time. They will be determined by the judge hearing the trial, barring settlement by the parties.

[28] Order accordingly.

"L.P. Williamson, J."

The Honourable Mr. Justice L.P. Williamson

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