

CANADA / JUDGMENT

Gershkovitch v. Bailey

2022 BCSC 1048

COURT

Supreme Court of British Columbia

DECIDED

22 June 2022

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2022 BCSC 1048 Gershkovitch v. Bailey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gershkovitch v. Bailey,

2022 BCSC 1048

Date: 20220622

Docket: E182726

Registry: Vancouver

Between:

Eli Aron Gershkovitch

Claimant

And

Brenda Leane Bailey

Respondent

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Claimant:

L.A. Cruickshank

Counsel for the Respondent:

A.E. Thiele

Written Submissions of the Claimant:

December 10, 2021

and February 11, 2022

Written Submissions of the Respondent:

January 28, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 22, 2022

[1] The parties each seek costs arising from my judgment given on October 22, 2021, the reasons for which are indexed at 2021 BCSC 2065 (the "RFJ"). The claimant also seeks an adjustment to the award pursuant to my invitation to the parties to correct any "mathematical calculations" in the judgment.

Costs

[2] The claimant argues that the primary matter at stake at trial was the respondent's claim to a share of the plaintiff's interest in the Steamworks business, which the claimant described as the "single largest, most time consuming, and costly aspect of the trial", and that the claimant was wholly successful on that issue. The claimant also argues that the question of whether the parties' marriage agreement (the "Marriage Agreement") should be set aside on common law grounds was a live issue throughout trial, before being withdrawn at the start of closing submissions.

[3] The claimant seeks costs on the basis of any of the following alternatives:

- a) Substantial success at trial;
 - b) Being the more successful party on many issues, which it is said would justify an order of partial costs, costs for an issue or costs for part of the proceeding; or
 - c) Costs in respect of late abandonment of the claims, abandoned at the conclusion of trial, to set aside the Marriage Agreement.
- [4] The respondent argues that there were multiple issues in the case and that she succeeded in whole, or in part, on many of them. In particular, the respondent argues that:
- a) While the Marriage Agreement was upheld, it was varied on the basis of unfairness, and on that issue the respondent was successful;
 - b) The respondent was also successful in obtaining an adjustment in respect of the equity in the family home;

- c) With respect to spousal support, the respondent was successful in establishing entitlement, overcoming the waiver in the Marriage Agreement, and having the claimant's Guidelines income set at an amount greater than his line 150 income; and
 - d) With respect to the claimant's request for reimbursement of amounts spent on the Cypress Property post-separation, or for occupation rent, the respondent was successful.
- [5] Both parties put before the Court various settlement offers made by them prior to trial. Both parties acknowledged that most of the offers were not made pursuant to R. 11-1 of the Supreme Court Family Rules, and thus are not properly considered by the Court in determining costs. Both parties acknowledged as well that there was no basis to conclude that any offer that was made in accordance with R. 11-1 is one that should have been accepted, given the circumstances at the time the offer was made. As a result, I do not find it necessary to consider any of those offers in this judgment.
- [6] The legal principles that apply are not generally in dispute. Pursuant to R. 16-1(7), costs should be awarded to the successful party unless the court otherwise orders. The successful party is the one who obtained "substantial success" at trial. In a case like the present, where a number of issues were decided by the Court, and success was mixed, determining who is the successful party is challenging.
- [7] Rule 16-1(14) specifically provides that:
- (14) The court may award costs
 - (a) of a family law case,
 - (b) that relate to some particular application, step or matter in or related to the family law case, or
 - (c) except so far as they relate to some particular application, step or matter in or related to the family law case
- and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.
- [8] Both parties referred me to a similar set of authorities, including *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at paras. 45-46, *lv to appeal* ref'd 2002 BCCA 454, and *Marquez v. Zapiola*, 2014 BCCA 35 at paras. 15-19.
- [9] The law on determining substantial success was usefully summarized by Justice Dardi in *D.J.D. v. M.L.D.*, 2017 BCSC 1417 at paras. 14-16:
- [14] In a family law case involving multiple issues and where there has been divided success, the Court must engage in a "substantial success" analysis. Substantial success, as defined in the authorities, is when the prevailing party succeeds on 75% or more on the matters in dispute. Substantial success in the litigation is measured objectively and is to be determined by the trial judge by considering the disputed matters globally. The weight and importance of all

the matters in dispute are to be taken into account together with the parties' corresponding relative success or failure. The 75% success threshold is intended to serve as a "rough and ready guide" and the Court is not required to evaluate the substantial success threshold with mathematical precision:

- [15] In *Fotheringham* at para. 46, Mr. Justice Bouck endorsed a four-step inquiry in assessing whether a party in a family law case has achieved substantial success in the litigation:
1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
 2. Second, by assessing the weight or importance of those "matters" to the parties.
 3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
 4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.
- [16] It is clear from the appellate decisions that a trial judge retains the discretion to determine whether there is a sound basis for displacing the usual costs award. Any discretionary exception to the usual costs rules must be made judicially

[Citations omitted.]

- [10] In the RFJ, I described in two different areas what was at stake at trial. In the introductory section, at RFJ paras. 1-2, I stated:
- [1] The central issue in this case is whether a marriage agreement that the parties entered into on July 30, 2009 (the "Marriage Agreement"), should be enforced by the court, or whether the court should on grounds of fairness:
- (a) Vary the distribution of the parties' assets mandated by the agreement; and
 - (b) Order payment of spousal support notwithstanding that the parties, in the Marriage Agreement, each waived spousal support.

There are also issues with respect to the proper interpretation of the Marriage Agreement, and in particular the proper calculation of "equity" in the home the parties lived in.

- [2] In this case, the respondent's position at the start of trial was that the Marriage Agreement should be set aside based on unconscionability and duress at the time of its formation. Those arguments were not pursued in closing submissions. Rather, the respondent focused on arguing that the Marriage Agreement operated unfairly in the circumstances.

- [11] Under the heading "Issues", at RFJ paras. 186-188, I stated:

- [186] The key issue in this action is to determine whether the Marriage Agreement should be upheld or varied. There are two stages to that analysis:
- (a) The court must first consider the division of the parties' assets in accordance with the Marriage Agreement; and
 - (b) The court then considers the fairness of the Marriage Agreement in its application and its consistency with the statutory objectives of governing legislation.
- [187] The court must then consider whether spousal support should be awarded in light of the property division determined at the second stage.
- [188] Finally, the court is asked to determine how to account for the amounts drawn by the respondent from the claimant's credit card as well as for the post-separation use of the Cypress Property by the respondent and Mr. Sanii.
- [12] After reviewing the facts and various evidentiary issues raised, I turned at RFJ para. 226 to consider "what the result at trial would be if the terms of the agreement were applied". This raised an interpretation issue as to dealings with "equity" as that term was used in the Marriage Agreement. At RFJ para. 258, I drew conclusions as to various adjustments to the equity calculation in respect of withdrawals of equity by the claimant. In my view, the respondent was substantially successful on this issue.
- [13] Beginning at RFJ para. 259, I considered the factors in s. 65(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], to determine whether the Marriage Agreement operated fairly. At RFJ para. 295, I identified three matters that might not have been reasonably anticipated by the parties. At RFJ para. 303, I drew conclusions with respect to each of the factors listed in s. 65(1). At RFJ para. 318, I concluded that some of the unforeseen matters could be dealt with through an award of spousal support. At RFJ para. 322, I concluded that s. 65(1) required in the circumstances an adjustment to the Marriage Agreement to double the lump-sum payment pursuant to s. 17 of the Marriage Agreement from \$100,000 to \$200,000.
- [14] The analysis contained at RFJ paras. 259 to 322 is the heart of the judgment. The respondent was successful in obtaining some relief. However, the respondent was seeking much more substantial relief, including an order that she be awarded an interest in the claimant's business and his antique automobile collection. She was not successful in those claims.
- [15] At RFJ para. 323, I considered whether an award of spousal support was appropriate, notwithstanding the waiver of spousal support in the Marriage Agreement. At RFJ para. 347-348, I concluded that the respondent had established entitlement to spousal support on a non-compensatory basis, but had not established entitlement on a compensatory basis.

- [16] I then went on to conclude that various payments made by the claimant in respect of credit card charges incurred by the respondent were properly characterized as in the nature of spousal support payments. I then concluded at RFJ para. 361 that the amount payable was \$117,600, but that the claimant should be given credit for the credit card amounts of \$115,393.73, and that the net spousal support payable was \$2,260.27.
- [17] The respondent was thus successful in establishing entitlement to spousal support and was given a small net award. Once again, however, the amount paid was substantially less than the award sought of indefinite spousal support award of \$35,000 per month.
- [18] Finally, I concluded at RFJ para. 354 that it would not be just and equitable to require the respondent to contribute to the amounts spent by the claimant in respect of housing costs. The respondent was thus successful on this issue.
- [19] To this list of issues must be added:
- a) the respondent's claim, advanced throughout trial but withdrawn in closing argument, to set aside the Marriage Agreement on grounds of unconscionability and duress at the time of formation (see RFJ at para. 2); and
 - b) the providing of submissions (and requiring submissions of the claimant) on the question of whether the Family Law Act, S.B.C. 2011, c. 25, should apply (see RFJ at para. 196).
- [20] Having reviewed the RFJ, and considered the parties' respective success on these issues, it is my conclusion that neither party was substantially successful. In addition, it is my view that the issues at stake do not lend themselves to identifying discrete portions of the trial at which specific issues were dealt with. The underlying factual matrix was of importance in determining multiple issues as to which the parties had varied success.
- [21] I conclude that this is a proper case for each party to bear their own costs.

Alleged Error in Mathematical Calculations

- [22] At RFJ para. 363, I gave the parties liberty to apply in the event of "errors in any of the mathematical calculations set out above" in the RFJ.
- [23] The claimant seeks to have me reconsider my calculation of the net amount payable in respect of spousal support in order to adjust for tax consequences, on the basis that the funds that were actually paid for the claimant's benefit were after-tax funds, whereas had the funds been characterized at the time as spousal support, they would have been tax deductible. The claimant submits that, rather than the claimant paying the respondent a net amount of \$2,206.26 (RFJ para. 361), the respondent should be paying the claimant \$41,589.73 in order to properly reflect those tax consequences.

- [24] The respondent argues that the Court provided rough justice with respect to the various claims for spousal support and the off-sets, that to the respondent's understanding, it is not possible to obtain deductions this late in the day, and that the expenses were based on a conclusion that the claimant's imputed Guidelines income was significantly higher than his actual income leading to an exaggeration of the tax consequences through standard Divorcemate calculations.
- [25] My assessment of the appropriate spousal support on the basis of the respondent's non-compensatory entitlement in this case was tied to her needs during a difficult time in her life. Those needs formed an important check on my considerations of numbers generated by the Spousal Support Advisory Guidelines. I did not understand the issue of tax consequences to have been argued at trial, and I see this issue as more than just an issue of mathematical calculation.
- [26] Ultimately, I do not consider it appropriate to reconsider my approach to the award of spousal support and its connection to the respondent's living costs in the months following the parties' separation. I would therefore not vary the order made at RFJ para. 361.

"Veenstra J."

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