

CANADA / JUDGMENT

Healey v. Healey

2023 BCSC 480

COURT

Supreme Court of British Columbia

DECIDED

7 March 2023

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2023 BCSC 480 Healey v. Healey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Healey v. Healey,

2023 BCSC 480

Date: 20230307

Docket: E201448

Registry: Vancouver

Between:

Margery Michelle Healey

Claimant

And

Michael Alexander Healey

Respondent

Before: The Honourable Justice Mayer

Oral Reasons for Judgment

Counsel for the Claimant:

L. Ridgedale

M. Turcott

K. Thompson, Articled Student

Counsel for the Respondent:

A. Winters

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 7, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 7, 2023

- [1] THE COURT: After the trial of this family case in September and October of 2022, on November 28, 2022, this Court found substantially in favour of the respondent Michael Healey. With respect to the issue of costs this Court ruled that Mr. Healey was substantially successful and therefore presumptively entitled to his costs. The parties were invited to make further submissions if there were matters related to quantum of or entitlement to costs, if required.
- [2] Mr. Healey seeks double costs pursuant to Rule 11-1(5) of the Supreme Court Family Rules, resulting from two offers to settle made September 2, 2020, ("offer number 1"), and September 1, 2022 ("offer number 2").
- [3] Offer number 1 was made within approximately two months of commencement of this action by Mr. Healey. Ms. Healey rejected offer number 1 on the basis that at that time, financial disclosure was not sufficient to allow her to assess the reasonableness of Mr. Healey's proposal.
- [4] Offer number 2 was made approximately three weeks before the commencement of trial.
- [5] By the time of the second offer, Mr. Healey had provided documents with respect to his income and assets and the parties had exchanged expert business valuation reports and guideline income reports.
- [6] With respect to the main contentious issues at trial, which in summary concerned payment of a compensation payment to Ms. Healey to effect the division of family property, and Mr. Healey's guideline income for support purposes and related to that the quantum of child and spousal support, offers 1 and 2 both included offers which exceeded the amounts ultimately determined at trial. As well, the amount of guideline income to be imputed to Ms. Healey after trial exceeded the amount included within both of these offers.
- [7] Rule 11-1(5) provides this Court with the discretion to award double costs on some or all of the steps taken in a case after service of an offer to settle.

- [8] Rule 11-1(6) sets out factors which the court may consider in determining whether to award double costs. They include:
- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.
- [9] The purpose of a double costs award, which is punitive in nature, is to encourage early settlement of disputes by rewarding the offeror who makes a reasonable offer and penalizing the party who declines to accept such an offer: *Hartshorne v. Hartshorne*, 2004 SCC 22 [Hartshorne].
- [10] Mr. Healey submits that at the time offer number 1 was made, Ms. Healey had received sufficient document disclosure to assess his offer. As a result, he submits that it was unreasonable for her to reject this offer in September 2020 or to not reconsider it after further disclosure was made. He says Ms. Healey has provided no rationale for not accepting offer number 2 as by the time of this offer all disclosure required for trial, plus expert opinions regarding property values and income had been exchanged.
- [11] Mr. Healey submits, and I have little difficulty concluding, that Ms. Healey would be financially better off if she had accepted either offer number 1 or offer number 2 than she is as a result of the decision at trial.
- [12] Mr. Healey submits, while implicitly acknowledging that the financial circumstances of the Healeys are not similar, Ms. Healey has the resources or access to resources to pay a double costs award. Therefore, financial burden of paying double costs is in his submission, not a salient issue for the court to consider.
- [13] Ms. Healey's position is that it was not unreasonable for her to reject offer number 1 for a number of reasons, including this offer was made at the time financial disclosure was in the early stages and going forward she took issue with the guideline income report prepared for Mr. Healey by Mr. Jensen and required additional time to commission her own competing guideline income report. In addition, she submits that there were pre-trial applications concerning the value of family property, which, in my words, made the question of value of some property a moving target. For example, she notes that on June 22, 2022, less than two months before trial, she brought an application for disclosure of documents concerning Mr. Healey's holdings in KFD and Alco and for appointment of a joint expert, which application went mainly by consent.

- [14] With respect to offer number 2, Ms. Healey submits that this was delivered only 19 days before trial.

Reasonableness

- [15] As I have already stated, one factor which the court may consider is whether the offer to settle was one that ought reasonably to have been accepted. As was confirmed by the Court of Appeal in *Cottrill v. Utopia Day Spas and Salons*, 2019 BCCA 26, the issue is not whether an offer is reasonable but whether it was unreasonable for a party to refuse it.
- [16] And as set out in *Hartshorne* one of the factors to be considered when evaluating reasonableness of an offer includes whether the offer can be easily evaluated.
- [17] In my view, at the time that offer number 1 was received, it was not unreasonable for Ms. Healey to take the position that full financial disclosure had not been provided. She did not yet have a guideline income report to counter the report commissioned from Mr. Healey. As a result, she was unable to easily evaluate the reasonableness of his offer.
- [18] With respect to offer number 2, I do not consider that it was unreasonable for Ms. Healey to have rejected this offer given the issues in dispute. Certain evidence related to Mr. Healey's assets and tax liabilities needed to be tested at trial. For example, and this is only one example, Mr. Johannesen's evidence concerning whether Mr. Healey could demand repayment of a multi-million dollar shareholder loan to KFD needed to be adduced at trial. Mr. Johannesen's evidence resulted in a finding that Mr. Healey could not do so, which had a significant impact on the determination of whether an unequal division of family property was appropriate in this case.

Relative Financial Circumstances of the Parties

- [19] I am advised that Mr. Healey's draft bill of costs reflects costs of \$64,720 and disbursements of \$78,659. An award of double costs would result in Ms. Healey paying approximately \$200,000 in costs.
- [20] The parties' relative financial situations are not equal. Mr. Healey has assets approaching \$17 million, admittedly, the bulk of which are excluded assets. Ms. Healey has assets valued at approximately \$2.2 million. Although this Court concluded that it was not appropriate to consider Mr. Healey's excluded assets in evaluating division of property, it is appropriate to consider the parties' post-judgment financial circumstances in determining whether a punitive double costs award is appropriate. In my view, the parties' relative financial circumstances militate against an award in double costs.
- [21] I note as well that with respect to ability to pay a double costs award, Ms. Healey does not have a significant income available to her to fund the payment of double costs.

- [22] Mr. Healey submits in essence that Ms. Healey has access to funds by borrowing, I assume, against the equity in her home or encroaching into a relatively limited bank account balance to pay this award.
- [23] In my view, an award of double costs would upset the balance achieved by the orders made after trial concerning division of family property, debt, and payment of spousal support.
- [24] I know that Ms. Winters, on behalf of Mr. Healey, argued in submissions that the court is to consider the balance achieved by orders in determining entitlement to costs simpliciter and is not, in her submission, to consider the balance achieved by orders made in the context of an application for double costs.
- [25] I'm not satisfied that that is the case. In my view, the court is to consider at all times the balance that would be achieved by any orders with respect to costs; in this case, the issue being an order with respect to double costs.
- [26] In conclusion, for the reasons I have already set out, I decline to exercise this Court's discretion to award double costs to Mr. Healey. Mr. Healey is entitled to his costs in respect of matters through until the conclusion of trial having been, as I indicated in reasons for judgment issued in November of last year, substantially successful on all of the issues, I'm not satisfied that there is any reason to find otherwise. In fact, no request is made by Ms. Healey for an order for costs other than the default order that typically follows.
- [27] With respect to costs of this application, presumptively, having been successful in opposing Mr. Healey's application for double costs, Ms. Healey would be entitled to costs of this application. Before I pronounce finally on that position, I will hear submissions from the parties starting with submissions from you, Ms. Ridgedale.
- [28] CNSL L. RIDGEDALE: Yes. And then as well, I'm not sure if it's the appropriate time to comment on the proposed costs sought by -- or the ordinary costs sought by Mr. Healey.
- [29] THE COURT: You could. If there's an issue with respect to costs, the usual order would be that costs are to be assessed. Is that --
- [30] CNSL L. RIDGEDALE: Yes.
- [31] THE COURT: Is that the order that -- are you are seeking that confirmatory order?
- [32] CNSL L. RIDGEDALE: Well, I don't know if we -- if that's proposed to be done today or another time in terms of the draft bill of costs that we have from Ms. Winters.
- [33] THE COURT: I think this can be -- the costs can be -- the issue of costs can be put before the registrar -
- [34] CNSL L. RIDGEDALE: All right.

- [35] THE COURT: -- in my preference rather than -- rather than bring them before the court. I don't think that -- unless there's -- unless there's something that you think requires this Court to evaluate the various cost claims, typically --
- [36] CNSL L. RIDGEDALE: No.
- [37] THE COURT: -- that would be the procedure to follow. In some cases, the parties want the court to deal with particular cost items if there's some controversy with respect to whether or not various -- various disbursements, for example, warrant it, but -
- [38] CNSL L. RIDGEDALE: No, that there is little controversy. It's just a matter of determining who was successful on which applications throughout the litigation.
- [39] THE COURT: All right. Ms. Winters?
- [40] CNSL A. WINTERS: Yes, Justice. In terms of costs of today, my submission would simply be that -- and this goes back to some of the things I said in my application in the main -- from our perspective, and it is our submission that Mr. Healey did everything possible to try to resolve this case. You've seen the offers now. Given the reasons and given the way in which this case unfolded, I do not -- we do not -- it's our submission, I should say, that Mr. Healey was reasonable in his view that this was an appropriate application to make. And at the very least, he shouldn't be penalized for bringing this application given that in all of the circumstances, particularly given the nature of the offers, this -- in our view, this is an application that could have been gone either way and perhaps should have, and so it's our submission that costs should be borne by each of the parties on that basis.
- [41] THE COURT: All right. I have your
- [42] CNSL A. WINTERS: And -- oh, sorry.
- [43] THE COURT: Yes.
- [44] CNSL A. WINTERS: And just in terms of the actual -- the bill of costs -
- [45] THE COURT: Yes.
- [46] CNSL A. WINTERS: -- I'm fine for my -- I believe what my friend is trying to sort out is how the interim applications will be addressed. That's -- it's fine for us to receive her comments on that. I think we can do that between counsel. I don't know that we need to have an order that costs be assessed at this point, but if that's what my friend wishes to have, that's fine. We've asked for their position, and I think we're just waiting on it.
- [47] THE COURT: All right.
- [48] CNSL L. RIDGEDALE: That's fine. Yeah. I don't disagree with that.
- [49] THE COURT: Okay. So I won't make any further orders then on directions with respect to how costs will be determined at the end of the day.

[50] With respect to costs of this application, this is not intended to be a moral comment with respect to Mr. Healey's motivations for bringing this application, he's entitled to bring an application for double costs, but it's not -- there is no presumption that there's an entitlement to that. The argument was made. The court found that it wasn't compelling. As a result, Ms. Healey has been successful in resisting this application, and, in my view, for the same reasons that Mr. Healey was awarded his costs of the trial, Ms. Healey should be awarded her costs in respect of this application. So that -- that will be my order with respect to costs.

"Mayer J."

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