
CANADA / JUDGMENT

Hudema v. Moore

2020 BCSC 1502

COURT

Supreme Court of British Columbia

DECIDED

17 September 2020

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2020 BCSC 1502 Hudema v. Moore

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hudema v. Moore,

2020 BCSC 1502

Date: 20200917

Docket: E191473

Registry: Vancouver

Between:

Jade Colin Alexander Hudema

Claimant

And

Daniele Marie Bernadette Moore

Respondent

Before: The Honourable Madam W.A. Justice Baker

(via Teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

A. Rangar, articling student,

appearing as agent for M. Epstein

Counsel for the Respondent:

J. Cudmore

Place and Date of Hearing:

Vancouver, B.C.

September 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 17, 2020

- [1] THE COURT: The parties to this action are alleged to have lived in the same house for a number of years and to have had a romantic relationship of some type, beginning possibly in 2015 and ending in approximately 2019. The central issue in this dispute is the nature and duration of the relationship between the parties.
- [2] This application by the respondent seeks the following relief.
1. , to have the validity and enforceability of an agreement made between the parties determined separate from all other issues in dispute; and
 2. to have examinations for discovery conducted without the parties present together in the same room, and to have the length of discoveries extended to seven hours.
- [3] In brief, the claimant commenced a family law proceeding claiming that the parties were in a marriage-like relationship for a number of years and seeking various family law relief against the respondent.
- [4] The respondent says that the claimant was her tenant for a number of years and that they had a dating relationship for some years. However, she says they entered into an agreement which is completely determinative in her favour and which confirms that they were not in a marriage-like relationship.
- [5] The respondent also alleges that the claimant was abusive and violent towards her, and she is afraid to be in the same room with him for discoveries. The claimant vehemently denies these allegations and says that he must be in the same room with her in order to properly examine her.

Bifurcation of the trial

- [6] Pursuant to Supreme Court Family Rule 14-6(2), the court may order that one or more questions of law or fact be tried and determined before others.

- [7] In *K.M.W. v. M.D.W.*, 2016 BCSC 228, the B.C. Supreme Court applied the law as set out by the B.C. Court of Appeal in the case of *Ross River Dena Council v. Canada*, 2013 YKCA 6, in which the court found that, for an issue to be determined separately from other issues in the litigation, the applicant must demonstrate that the issue is capable of being decided independently of other issues and that trying one issue independently will result in efficiencies in the litigation.
- [8] In this case, the parties entered into an agreement, dated for reference November 27, 2017. This agreement states, in essence, that the parties agree that they are not in a marriage-like relationship, even though they are living in the same house, and that neither party will make a claim against the other for support or a share in the other's assets or estate. Further, they both agree that the agreement can be filed and exhibited in any proceedings which one of them may take in contravention of the agreement.
- [9] The respondent says this agreement is clear on its face and is determinative of all issues raised by the claimant.
- [10] The claimant says that this agreement was only entered into to assist the respondent in her divorce proceedings from her previous husband, and that they were in fact in a marriage-like relationship for a number of years. The claimant makes various family law claims against the respondent flowing from their marriage-like relationship.
- [11] The trial of this matter was originally set for four days. At a trial management conference held in July 2020 the trial was extended to five days.
- [12] The claimant now estimates that considerably more time than five days will be required for the trial of this matter. The respondent initially sought to have the enforceability of the agreement determined by way of summary trial. Her ability to bring this forward was interrupted by the COVID pandemic. Finally, she was able to bring it on for hearing in August 2020, but on the date set there was not a judge available and the matter was adjourned.
- [13] The respondent is concerned that this matter get resolved sooner rather than later. She is a professor at the Sorbonne University in France and she says that the dispute between the parties has prevented her from returning to France, thus putting her employment in jeopardy. She says that if more than five days are required for the trial, as appears to be the suggestion of the claimant, the November 2020 date will come off the list and the parties will not be able to reset their trial until 2022. This will be significantly prejudicial to the respondent, she argues.

- [14] The respondent proposes, on this application, that the enforceability of the agreement between the parties be determined during the days set aside for the trial in November 2020. If the court determines the agreement is enforceable, the respondent says this will finally determine all issues between the parties and there will be no need for further trial days. If the court finds the agreement is not enforceable, then the parties can address any remaining evidence at a later date when the trial is reset.
- [15] The claimant's argument at trial puts into issue the validity of the agreement. However, having reviewed the materials on this application, I am satisfied that five days is adequate to address the circumstances in which the agreement was made and its intended effect.
- [16] Further, I am satisfied that a determination of the enforceability of the agreement can be made fairly in the absence of the other claims advanced by the claimant, and that the determination of the enforceability of the agreement will materially advance this litigation. Determination of this question will either finally determine the litigation, or will encourage the parties to settle the remaining issues.
- [17] If a further trial is necessary, it will be much shorter than 10 days and the parties may be able to find a date sooner than if the trial is to be reset for 10 days. At most, five days of trial time will be required to determine the enforceability of the agreement and my sense, after reviewing the issues, is that less than five days will be required. If the enforceability of the agreement is to be determined with all other issues in the litigation, the parties will likely need 10 days of trial time and are unlikely to be able to reset this trial until 2022. I find that determining the enforceability of the agreement in advance of the other issues is an efficient means to advance the litigation, which has the potential to save significant time if the respondent is successful and does not prejudice the remaining issues if the respondent is unsuccessful.

Examinations for discovery

- [18] The respondent seeks orders with respect to examinations for discovery. First, she seeks an order that the discovery takes place without the requirement for the parties to be present in the same room during the discovery. Second, she seeks an increase in the time allowed for discoveries to seven hours.
- [19] The respondent initially based her submission on allegations that the claimant abused and threatened her, and that she felt unsafe in the same room with him. While those submissions continue, she and her counsel now also suggest that during this COVID pandemic and the rising rate of infection, they are not comfortable being in an enclosed space with other people for the discoveries.

- [20] The claimant resists the suggestion that the parties would not be in the same room for the discovery process. He argues that he must be in the same room with the respondent to properly assess credibility, and so that the claimant and his counsel can confer together in response to positions taken by the respondent in the discovery.
- [21] The respondent produced affidavit evidence supporting her allegations that she was harmed by the claimant in the past. This evidence includes her recounting of alleged assaults by the claimant on her and descriptions of the damage she alleges he did to their home; a medical assessment of domestic abuse; photographic evidence of her injuries and damage to the home; a copy of an award from the Crime Victim Assistance Program; and a subpoena directed to the respondent in a criminal trial for assault brought against the claimant, which will be heard in October 2020. The respondent also produced a release order made against the claimant requiring him to have no contact directly with her. He is able to only have indirect contact with her through a professional such as a counsellor, family justice counsellor, or mediator.
- [22] The claimant vehemently denies these allegations of abuse and counters with his own allegations that the respondent abused him, which are supported by text messages and emails between the parties and records of counselling sessions attended by the claimant to address the respondent's violence towards him.
- [23] Counsel for the respondent advised me that he has consulted with the reporting agencies and they have protocols in place to conduct discoveries remotely during the pandemic. While in ordinary times it is unusual for parties to conduct discoveries over video technology such as Skype or Zoom, these are not ordinary times. During the pandemic, witnesses' evidence is often called in trials using these technologies, mediations are routinely now being conducted using remote technology, and discoveries are being conducted routinely using video technology. Given the pandemic, I would easily grant an order that the parties may attend discoveries using remote technologies. The judicial system must adapt and ensure that the participants are safe during these times as they continue to advance their litigation.
- [24] As stated by the court in *Arconti v. Smith*, 2020 ONSC 2782:
- [19] In my view, the simplest answer to this issue is, "It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.

[20] That is not to say that there are not legitimate issues that deserve consideration. Technology is a tool, not an answer. In this case, the parties cannot attend in the same location due to health concerns and governmental orders. So, the question is whether the tool of videoconference ought to be required to keep this matter moving or if the mini-trial ought to be delayed further due to the plaintiffs' desire to conduct an examination for discovery in person.

...

[30] Counsel's desire to have his team with him is very similar to the plaintiffs' concern in this case that they wish to be able to assist Mr. Bastien during the examination of Mr. Fenton.

[31] Justice Morgan expressed two concerns. First, he found that the use of remote technology would raise "due process concerns" for the unsuccessful party. Second, he expressed his discomfort requiring counsel to proceed where he or she perceives that they may not be able to present their case as effectively as they would in person.

[32] I respectfully do not find the presence of any "due process concerns" inherent in the format of a video hearing. All parties have the same opportunity to participate and to be heard. All parties have the same ability to put all of the relevant evidence before the court and to challenge the evidence adduced by the other side. The only possible "unfairness" is a lack of comfort by one counsel that he or she will be at their best in presenting evidence and making arguments using technology. That conflates the two concerns raised by Morgan J.

[33] In my view, in 2020, use of readily available technology is part of the basic skillset required of civil litigators and courts. This is not new and, unlike the pandemic, did not arise on the sudden. However, the need for the court to operate during the pandemic has brought to the fore the availability of alternative processes and the imperative of technological competency. Efforts can and should be made to help people who remain uncomfortable to obtain any necessary training and education. Parties and counsel may require some delay to let one or both sides prepare to deal with unfamiliar surroundings. I note that Morgan J. held the case conference last month not long after the Chief Justice announced the restriction of court operations, and that he adjourned the hearing of the motion to late June. Whether he is asked for or grants further adjournments at that time remains to be seen.

[34] In *Capic v Ford Motor Company of Australia Limited*, [2020] FCA 486, Perram J. of the Federal Court of Australia considered whether to adjourn a trial that was scheduled to commence during the pandemic. The trial was scheduled to take six weeks. Perram J. ordered the trial to proceed by remote technology.

[35] Perram J. recognized that not every case will be fit for remote hearing. He considered a number of issues such a variations in available internet connectivity, the omnipresent risk of software glitches, the difficulty preparing witnesses remotely, the difficulty of experts hot tubbing remotely, the risk of fraudulent coaching of witnesses, that not everyone has a computer, and more. I propose to deal with just two of the issues he raised.

[36] First, on the question of whether the examiner needs his or her team (and clients) together, Perram J. wrote:

Secondly, senior counsel for the Respondent raised with me the real difficulty of the practitioners not all being together in one place for the trial. It is common for the people sitting behind counsel to convey useful and sometimes critical information to senior counsel via junior counsel and likewise junior counsel frequently are able to assist senior counsel on the storm-tossed seas. The ability to do this where everyone is in their own home is certainly degraded. However, in the hearing last month to which I have already referred senior and junior counsel who were isolated from each other communicated with one another and independently of me using WhatsApp. In the virtual hearings I have conducted I have communicated with my associates on an instant messaging platform which has worked well. There is the difficulty of document sharing over such a platform which I accept. Receiving whilst in full flight a WhatsApp message with a document attached is not the same experience as having one's gown tugged and a piece of paper thrust into one's hands. Again, whilst I think this is a poor situation in which to have to run a trial I do not think it means that the trial will be unfair or unjust.

[37] In other words, just as all litigators have had to learn how to deal with juniors conveying information during an examination or argument in court, there are ways to do the same thing with technology. I note that the Zoom technology, that is currently among the brands being utilized in this court, includes "breakout rooms" in which counsel can meet privately with colleagues and clients. We are learning new ways to do things and they feel less "good" because we do not yet have the same comfort with the technology that we have with our tried and true processes.

...

[43] I agree but with this proviso. In my view, much of the hesitancy and concern that led to the conclusions that the process is "unsatisfactory" or raises "due process concerns" stems from our own unfamiliarity with the technology. As noted above, it is just a tool. It does not produce perfection. But neither is its use as horrible as it is uncomfortable.

[44] In my view, the plaintiffs' concerns with the prospect of conducting an examination remotely do not outweigh the desirability of proceeding with this matter and do not justify further delay. These actions have been outstanding for several years. The defendants are entitled to have their motion heard just as the plaintiffs are entitled to seek compensation. The plaintiffs' concerns, in the main, are soluble either by creative alternatives or by increased familiarity with the technology. I do not accept that anything will be lost that is not more than offset by the proportionality of proceeding efficiently and affordably.

I adopt the reasoning of F.L. Myers J. in *Arconti*.

[25] In the case before me, I am persuaded that the discoveries ought to proceed by way of remote attendance or videoconferencing. I am persuaded for two reasons. First, the allegations of abuse between the parties, while contested, are supported by evidence which

suggests to me that there is a higher level of animus between the parties than in most cases and that violent outcomes between the parties can result from this animus. I further note that the release order of the claimant prohibits direct contact between the parties, and a face-to-face examination for discovery between the parties would appear to be contrary to that order. Secondly, I find that, during the days of this pandemic, the parties and their counsel must adapt and overcome fears of unknown technology to allow litigation to proceed in a manner which complies with public health recommendations and avoid unnecessary meetings of people in enclosed spaces.

- [26] The respondent proposes to increase the time for discovery to seven hours, pursuant to Rule 9-2 of the Supreme Court Family Rules, primarily to allow for any additional time that may be required as the parties deal with complications arising from the videoconferencing process. I agree that additional time should be allowed to accommodate such difficulties and make the order increasing hours for discovery to seven hours.

Conclusion

- [27] I make the orders sought by the respondent on this application as set out in her notice of application at paragraph 1(b), paragraph 2, and paragraph 3.
- [28] In addition, I order that, at the request of either party, examinations for discovery may be undertaken remotely through the use of videoconferencing and, in the alternative, if the parties agree to conduct the discoveries partially in person, I order the terms set out in paragraph 1(a) of the respondent's notice of application.

"Baker J."

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