
CANADA / JUDGMENT

Ibrahim v. Habte

2006 BCSC 840

COURT

Supreme Court of British Columbia

DECIDED

31 May 2006

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2006 BCSC 840 Ibrahim v. Habte

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ibrahim v. Habte,

2006 BCSC 840

Date: 20060531

Docket: 05-4136

Registry: Victoria

Between:

Muna Ibrahim

Plaintiff

And:

Girma Habte

Defendant

Before: The Honourable Mr. Justice Melvin

Reasons for Judgment

(in Chambers)

Counsel for the Plaintiff:

M. H. Zoraik

Counsel for the Defendant:

B. J. Kitzke

Date and Place of Trial/Hearing:

May 5, 2006

Victoria, B.C.

- [1] By his notice of motion issued April 25, 2006, the defendant seeks a dismissal of the action commenced by the plaintiff.

History

- [2] On July 6, 2001, the plaintiff filed a writ of summons and a statement of claim in Action No. 01-3019 seeking a divorce, custody, child support, spousal support and division of assets. That claim for a division of assets included an interest in the matrimonial home. In the statement of claim, the plaintiff was seeking an order for equal division of family assets and in addition, an order prohibiting the defendant from disposing of property and a certificate of pending litigation with reference to the lands and premises in which the plaintiff claimed an interest.
- [3] As a result of these proceedings, the parties were divorced on December 11, 2002. During the relevant period of time, both parties were represented by counsel who entered into settlement negotiations on the issues relating to a division of family assets and spousal maintenance. As a result of their negotiations, which according to the material filed resulted in an agreement, counsel for the defendant applied for and obtained an order on June 10, 2004 from this court, upon the parties being duly served, that the plaintiff's claim for division of the family assets and spousal assets was dismissed, and that the certificate of pending litigation against the defendant's property was cancelled and removed.
- [4] Subsequently, after retaining new counsel, on August 25, 2005, the plaintiff commenced a new action against the defendant, Action No. 05-4136, seeking inter alia spousal support and division of family assets. With respect to the relief claimed, the plaintiff sought an order that the defendant was a trustee of the plaintiff's interest in all properties "under his ownership and control but not limited to the matrimonial home". In this respect, the plaintiff alleges that the defendant owed the plaintiff duties as a trustee in respect of the property.
- [5] After commencing that action, counsel applied to have the earlier order of June 10, 2004 vacated and the certificate of pending litigation restored. That application was heard on February 20, 2006, at which time the Honourable Madam Justice Sinclair Prowse dismissed the plaintiff's application to set aside the June 10, 2004 order.
- [6] In the reasons for judgment of Sinclair Prowse J., she noted that the plaintiff sought to have the order set aside alleging that her failure to attend was not as a result of wilful delay or default. As Sinclair Prowse J. noted, by the end of 2003, the parties had been divorced and any claims pertaining to their child had been addressed and were continuing to be

addressed in the Provincial Court of British Columbia. As a consequence, at the beginning of 2004, the only remaining claims were the plaintiff's claims for division of family assets and spousal maintenance.

[7] Sinclair Prowse J. found that counsel for the defendant, on June 9, 2004, wrote to the then counsel for the plaintiff confirming resolution of the outstanding issue and confirming that the plaintiff had agreed not to oppose the application to dismiss the original action.

[8] In her reasons, Sinclair Prowse J. noted:

... I am satisfied that Ms. Habte, through her counsel, was guilty of wilful default. That is, I am satisfied that her non-attendance was deliberate.

[9] In the result, Sinclair Prowse J. dismissed the application to set aside the order of June 10, 2004. As that order disposed of the property claims, the defendant brings the application in the new action for dismissal on the basis that the proceeding are res judicata. The plaintiff did not appeal the judgment of Sinclair Prowse J.

[10] The issue at this hearing is to determine whether or not the plaintiff's second action be dismissed on the basis that the issue is res judicata despite the family nature of the proceedings.

[11] In that respect, a number of authorities were referred to considering the court's jurisdiction to revisit matrimonial issues. Pursuant to the terms of the Divorce Act and the Family Relations Act, matters of child or spousal support are matters which may be revisited from time to time, depending on the circumstances of the parties. Section 17 of the Divorce Act allows for the varying, rescinding or suspending, prospectively or retroactively a support order. In that context, a support order means a child support order or spousal support order. The same powers are found in Part 7 of the Family Relations Act with reference to spousal support orders made under that statute. In the case at bar, matters relating to the child of the marriage are currently subject to processes in the Provincial Court of British Columbia.

[12] Consequently, those authorities that deal with spousal and child maintenance make it abundantly clear, as do the relevant statutes, that res judicata is not in issue in that respect.

[13] The issue in the case at bar is whether or not the dismissal of the action of the plaintiff following settlement amounts to a final determination of property issues between the parties.

[14] It is obvious from the findings of Sinclair Prowse J. and the evidence before her that the order sought to be set aside was predicated upon a consent of the parties and as a result, counsel for the plaintiff did not appear on the application for dismissal of the action.

[15] In *Shackleton v. Shackleton*, 1999 BCCA 704, the Court of Appeal dealt with the issue on the basis of a consent order dividing assets on the basis of a settlement of the issues between the parties. Subsequent information caused Mrs. Shackleton to seek a greater portion of assets.

- [16] In resolving the issue, the court stated at paras. 11 and 12:
- [11] In my view, the consent order reflecting the settlement of issues between the parties, in these circumstances, barred the Chambers Judge from dividing the severance pay.
- [12] A consent order is a formal expression of an agreement between the parties. Where parties intend to finally dispose of the issues between them, a consent order will operate as a final judgment: *Campbell v. Campbell* [1955] 1 D.L.R. 304 (B.C.S.C.). For the same reason that courts enforce settlement agreements, to provide certainty to parties settling disputes, consent orders are not easily altered. Subject to statutory provisions otherwise a consent order may be set aside or altered in substance only in circumstances which justify the same treatment to the underlying contract: *McCowan v. McCowan* (1995), 14 R.F.L. (4th) 325 (Ont. C.A.); *Monarch Construction Ltd. v. Buildevco Ltd.* (1988), 26 C.P.C. (2d) 164 (Ont. C.A.); *Huddersfield Banking Company Limited v. Henry Lister & Son Limited* (1895), 2 Ch. 273 (C.A.); *Dawe v. Dawe* (1985), 45 R.F.L. (2d) 254 (B.C.S.C.); *aff'd* (1986), 2 R.F.L. (3d) 430 (B.C.C.A.); and *T.(T.L.A.) v. T.(W.W.)* (1996), 24 R.F.L. (4th) 51 which leaves unanswered the issue of reopening a consent order under s. 68 of the Family Relations Act.
- [17] In the result, the court concluded that there was no basis upon which to review, vary or reopen the consent order. In this respect, similar conclusions were reached in *Dawe v. Dawe* (1985), 45 R.F.L. (2d) 254 and *R.L.S. v. D.C.M.*, 2002 BCSC 1794.
- [18] In addition, I note with reference to the Family Relations Act, s. 20 provides as follows:
- Subject to this Act, if a court has made an order under this Act, except an order under Part 5 or 6, the court may, on application, vary or rescind the order if circumstances have changed since the order was made or last varied.
- [19] The exceptions to Part 5 and Part 6 of the Family Relations Act are of significance as those parts refer to matrimonial property (Part 5) and division of pension entitlement (Part 6). Had the Legislature wished to allow a party to an order under Parts 5 or 6 of the Family Relations Act to apply for a variation, rescission or substitution, it could have clearly done so. In my view, the exceptions of Part 5 and Part 6, identified in s. 20 of the Act, support the conclusion that once an order has been made dealing with this particular subject, the matter is at an end.
- [20] Although the order in question is not expressed in terms of consent, when one considers the circumstances under which the order made predicated on the letter confirming the settlement from counsel for the defendant as described in the reasons for judgment of Sinclair Prowse J., in my view, the failure of the plaintiff to attend after being notified of the application, based on the settlement, makes it clear that the application was not made in default. Although technically counsel for the plaintiff did not appear and formally give his consent to the court for the dismissal order, or endorse the dismissal order, it is obvious that the application of the defendant was made with the consent of the plaintiff. Under those circumstances, in my view, no distinction should be made between an order which is

formally consented to on its face, and one that is obtained under the circumstances of the case at bar.

- [21] The claims of the plaintiff relate to family property in both actions. Merely alleging a different cause of action as a basis for the claim does not preclude the application of the principle of res judicata. See *Wayneroy Holdings Ltd. v. Sideen*, [2002] B.C.J. No. 2472, at para. 20:

With respect to res judicata, the following helpful discussion takes place at pp. 64-65 of the judgment of Mr. Justice Carrothers of our Court of Appeal in *Lehndorff Management v. L.R.S. Development Enterprises Ltd.* (1980), 19 B.C.L.R. 59:

This problem [the defence of res judicata] is not new. In 1843 Vice-Chancellor Wigram had this to say about it, as settled law at that distant time, in *Henderson v. Henderson* (1843), 3 Hare 100 at 114-15, 67 E.R. 313 at 319:

"I believe I state the rule of Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

- [22] Consequently, I am satisfied that the dismissal of the prior action involving property claims is a bar to any further proceedings by the plaintiff in respect of that subject. The plaintiff's new action is dismissed and the defendant shall recover his costs. The dismissal of the second action does not preclude the plaintiff from pursuing claims for child or spousal support in the outstanding Provincial Court proceedings.

"F.A. Melvin, J."

The Honourable Mr. Justice F.A. Melvin

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