

CANADA / JUDGMENT

Kilinnik v. Maller

2024 BCSC 530

COURT

Supreme Court of British Columbia

DECIDED

15 March 2024

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2024 BCSC 530 Kilinnik v. Maller

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kilinnik v. Maller,

2024 BCSC 530

Date: 20240315

Docket: E59382

Registry: Kamloops

Between:

Olga Kilinnik

Claimant

And

Iosif Claudiu Maller, Augustin Nertan and Igor Bibko

Respondents

And

Vasily Rozhkov and Galina Rozhkova

Respondents by Counterclaim

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

C. Soll

Place and Date of Trial/Hearing:

Kamloops, B.C.

March 15, 2024

Place and Date of Judgment:

Kamloops, B.C.

March 15, 2024

- [1] This is the written version of judgment delivered orally on March 15, 2024, prepared on an expedited basis. Edits have been made to improve clarity and add dates for certain events, but nothing about the analysis or conclusion has changed.
- [2] THE COURT: This judgement is rendered in unusual circumstances. It is important to explain how it came about.
- [3] This matter was before me for trial, which resulted in reasons for judgment issued in August 2023: 2023 BCSC 1469 ("Trial RFJ"). It may be helpful for anyone wanting to fully understand the context of this judgment to read the Trial RFJ.
- [4] In addition to the Trial RFJ, two supplemental judgments have been issued:
 - a) 2023 BCSC 1893, dated October 30, 2023, dealing with special costs and other matters ("Supp. RFJ");
 - b) 2023 BCSC 2221, dated December 18, 2023: this addressed a number of issues, the most relevant of which for the purposes of this judgment was the order granting the claimant sole conduct of sale of what is defined in para. 10 of the Trial RFJ as Property 2 ("Further Supp. RFJ").
- [5] The order granting the claimant sole conduct of sale had been sought at the October 5, 2023 hearing, but as I explained at paras. 77-80 of Supp. RFJ, I agreed that the respondent Iosif Maller (the other respondents, including the respondents by counterclaim, have never been involved in the litigation) did not have fair notice that relief was being sought. Accordingly, I allowed the parties to file additional material.
- [6] The parties did so by written submissions; I considered those and in Further Supp. RFJ, I granted the order for sole conduct of sale, and other orders.
- [7] The following is a summary of relevant events since the Trial RFJ was issued:

- a) Mr. Maller filed an appeal of the Trial RFJ, and he retained new counsel (Russell Tretiak, K.C.) for the appeal. I note that Mr. Maller's trial counsel (Mark Chiu) filed a notice of intention to withdraw dated May 12, 2023; I only became aware of that when Mr. Chiu appeared in a limited capacity at a hearing prior to issuance of Supp. RFJ.
- b) Until very recently, no notice of change of solicitor in the Supreme Court has been filed on behalf of Mr. Maller.
- c) In January 2024, Mr. Tretiak sought to appear before me by MS Teams to seek a stay of the Trial RFJ and Supp. RFJ. After correspondence with Supreme Court scheduling, a hearing date by MS Teams was set for the stay application on March 13, 2024 at 9:00 a.m..
- d) On March 1, 2024, Supreme Court scheduling forwarded material to me regarding the March 13, 2024 hearing. However, that material was not Mr. Maller's application for a stay, but an application filed by the claimant, Olga Kilinnik, with supporting affidavit seeking an order for possession of Property 2 based on her contention that Mr. Maller was interfering with her ability to conduct the sale of Property 2.
- e) Upon reviewing that application, I became aware that Mr. Tretiak was no longer representing Mr. Maller. I, again, confirmed no notice of change of solicitor was filed on behalf of Mr. Maller in the registry after Mr. Chiu withdrew in May 2023. That means that Mr. Maller was self-represented.
- f) A memorandum was issued on March 4, 2024, to Ms. Kilinnik via her counsel, Christopher Soll, and Mr. Maller, which stated:

On behalf of Mr. Maller, Mr. Tretiak K.C., filed a Request to Appear before Justice Sharma to apply for a stay, and the Court has reserved one hour on March 13, 2024, at 9 a.m. (by MS Teams) for that purpose. Mr. Tretiak recently confirmed he would not be representing Mr. Maller for that application. No application for a stay or any supporting material has been filed. If Mr. Maller still wishes to have an application for a stay heard on March 13, 2024, Justice Sharma directs that the application and supporting affidavit must be filed no later than 4 p.m. on Wednesday, March 6, 2024.

Ms. Kilinnik has filed an application seeking enforcement of previous orders, and other relief. Justice Sharma directs Mr. Soll, if he has not already done so, to deliver directly to Mr. Maller by email Ms. Kilinnik's March 1, 2024 application and affidavit.

Ms. Kilinnik's application will be heard on March 13, 2024, at 9 a.m. (by MS Teams). Mr. Maller has until 4 p.m. on Friday, March 8, 2024, to file any material in response to Ms. Kilinnik's application.

- g) I was advised on March 11, 2024, that Mr. Maller informed Supreme Court Scheduling that he was not available on March 13, 2024, and that his "new counsel" was also not available. I was also informed that Mr. Soll's position was that the March 13, 2024 hearing would go ahead.

- h) I again confirmed that no change of solicitor had been filed, so Mr. Maller was still self-represented. I instructed Supreme Court Scheduling to confirm with the parties that the hearing would go ahead on March 13, 2024, but at 3 p.m. rather than 9 a.m. (the time change was necessitated by my schedule).
- [8] The hearing convened on March 13, 2024, some time after 3:43 p.m. due to the courtroom being occupied with another matter up until that time. Mr. Soll confirmed that he received communication from Amrit Grewal who indicated that he had very recently been contacted by Mr. Maller, but at that point, Mr. Grewal had not actually been retained. Nevertheless, Mr. Soll appropriately relayed a request for an adjournment.
- [9] After confirming with Mr. Soll that Ms. Kilinnik's March 1, 2024 application and supporting affidavit had been delivered to Mr. Maller within the appropriate timelines required under the Supreme Court Family Rules, I asked for his submissions on whether the hearing should proceed, noting that no application for an adjournment had been filed, delivered, or submitted and no evidence supporting such an application was submitted or even referred to.
- [10] After hearing from Mr. Soll, I declined to adjourn the hearing.
- [11] I then heard submissions from Mr. Soll on the orders sought by Ms. Kilinnik in her March 1, 2024 application. I sought his submissions on potential timelines to allow Mr. Maller to apply to set aside any orders I granted, given the indications that he was perhaps in the process of retaining counsel.
- [12] I granted the orders sought with some variations and made provision for Mr. Maller to apply to set aside the order, within strict timelines. I considered the timelines appropriate, in part, because the March 13, 2024 date was originally sought by Mr. Maller, and he had been appropriately served with the March 1, 2024 application and further received confirmation of what he could do by way of memorandum from the Court. I also took into account Ms. Kilinnik's evidence and position about urgency given her financial situation. The timelines also accounted for what I knew about my availability given the application to set aside my order would need to come back before me.
- [13] The orders granted were as follows (collectively, the March 13, 2024 Order):
- a) Pursuant to s. 96 of the Family Law Act, S.B.C. 2011, c. 25, pending the sale of the property, Ms. Kilinnik shall have exclusive possession and right of occupancy of the property located at 1108 Burgess Way, Kamloops, B.C., more particularly known as: PID:017-818-419 Lot 24 Plan KAP 47403 Section 25 Township 19 Range 18 Meridian Land District 24 (the "Burgess Property").
- b) Mr. Maller shall vacate the Burgess Property within ten (10) days of the making of this order.

- c) An order pursuant to s. 96 of the Family Law Act that if Mr. Maller does not vacate the Burgess property within 10 days of the making of this order, the court bailiff shall promptly enter the Burgess Property and cause Ms. Kilinnik to have possession of it.
- d) Pursuant to s. 96 of the Family Law Act, in the event Mr. Maller refuses or neglects to sign any conveyance or other document necessary to complete the sale of the Burgess Property, Ms. Kilinnik shall be designated pursuant to R. 15-8 of the Supreme Court Family Rules to sign on behalf of Mr. Maller.
- e) Ms. Kilinnik has leave to appear before Justice Sharma on short notice in the case any further order is required by the Registrar of Land Titles.
- f) Mr. Maller has leave to apply to vary or set aside this order so long as that application and an online request to appear before Justice Sharma is filed no later than seven days from today, and any resulting hearing will be set no later than April 12, 2024, at a time to be determined by the Court and counsel.
- g) Special costs are granted to Ms. Kilinnik for today's application.

[14] I asked Mr. Soll to communicate March 13, 2024 Order to Mr. Grewal.

[15] On March 14, 2023, after 5 p.m., Mr. Grewal filed an online request to appear before me seeking a one-and-a-half-hour hearing. The following appears under "Nature of the Application":

An application to set aside the orders made on march 13, 2024 pursuant to the Order made by Justice Sharma that Mr. Maller is at liberty to apply to set aside the Order. Counsel requests a MS Teams appearance. Counsel for Mr. Maller also wants to note for Justice Sharma the following. He is on vacation from March 15, 2024 to March 27, 2024, and has proposed alternate filing dates for filing of his application to Claimant's counsel (no consent has been provided as of writing this request). Counsel for Mr. Maller is also trying to arrange a colleague to assist in drafting materials within the 7 days set out in the March 13, 2024 order, but given the vacation, it may not be possible to do.

[16] I also became aware that Mr. Grewal did file a notice of change of solicitor on March 13, 2024, I assume during or after the March 13 hearing was taking place.

[17] Upon review of the online request, I was concerned that it did not appear to fully appreciate or address the context in the March 13, 2024 Order, especially the urgency. Specifically, Mr. Maller was not at liberty to apply to set aside the orders, but was required, no later than seven days from March 13, to file an application and complete an online request to appear.

[18] The request to appear is unfortunate in that it does not seek an extension of time to file materials for an application to set aside the March 13, 2024 Order. I infer that is what is being sought by the description as to the nature of the application, but at the same time, it states the lawyer is going on vacation very shortly.

- [19] It was unclear to me if Mr. Grewal appreciated how the March 13, 2024 hearing came about and that it was originally set by Mr. Maller for an application for a stay that has never materialized. Nor is there any indication of the basis upon which the March 13 orders should be set aside. There is no indication of what facts would support that application given the events I have described above.
- [20] I therefore requested on an urgent basis that the parties appear before me (and I specifically asked court staff to inform both Mr. Maller and Mr. Grewal of my request).
- [21] That brings me to today's hearing.
- [22] I rely on Mr. Soll's statement, as an officer of the court, that he did inform Mr. Grewal as to the details of the March 13, 2024 Order, shortly thereafter. Mr. Maller chose not to appear.
- [23] Unfortunately, Mr. Grewal is unavailable, and no arrangements have been made for anybody else to appear today. I stood down, and Mr. Soll very kindly made an enquiry of the law firm, and it appears that no one would be available to appear on behalf of Mr. Grewal as the lawyers apparently listed on a firm's website share space but not practices.
- [24] I must assume that Mr. Grewal agreed to represent Mr. Maller with understanding of at least some basic history of the case, even if not the full history. I do not know if Mr. Grewal has had the chance to read the entirety of the judgments issued, but having taken on this file, I infer he must have been aware of the nature of the March 13, 2024 hearing and how it came about. I know he was told what orders were granted that day. That is why it was concerning that there is no indication, in the request to appear, of the basis upon which Mr. Maller applies to set aside the orders.
- [25] This brings me to a vitally important piece of information. Mr. Soll advised me today that it appears Mr. Maller has, in contravention of the order granted in December 2023, listed the Burgess Property for sale--the very property that is the subject of the orders that I have granted in favour of Ms. Kilinnik on March 13, 2024.
- [26] I am aware of the case law that allows me to rely on representations from counsel about facts where I have no reason to believe they are inaccurate. I rely on Mr. Soll's representation to me about that fact, which was corroborated by a document.
- [27] The orders I granted on March 13 contemplated a tight timeline for any application to set them aside. That was done in light of the evidence from Ms. Kilinnik about financial hardship given Mr. Maller's continued failure to comply with previous orders nor successfully seek a stay of them.
- [28] It is possible that Mr. Grewal might have believed it was reasonable for him to propose different dates for exchanging material, and a hearing date still before April 12 to accommodate his vacation schedule. Perhaps, that would normally be an acceptable basis upon which to extent court-imposed, strict timelines, but it fails to account for the evidence that was filed in support of the March 1 application, what has happened on this file,

specifically the events I described above. Specifically, on this particular file, the fact that new counsel was recently retained does not, without more, immediately constitute a reason to grant Mr. Maller any extensions of time.

- [29] Mr. Maller has listed the Burgess Property for sale in direct contravention of a court order. He has no legal authority to do so. He has done so in the face of findings made two days ago that he has been obstructing and making it difficult for Ms. Kilinnik to conduct a sale, which was ordered in December 2023.
- [30] I acknowledge that people are entitled to change legal representation. I have not been told the reason why Mr. Tretiak was let go by Mr. Maller. I am not suggesting I should know the reason, but my concern is the very real possibility that Mr. Maller's change of counsel is part of a pattern of conduct. I specifically find there is a possibility that both the fact and the timing of his change of counsel is a strategy to obstruct Ms. Kilinnik getting the full benefit of judgements she has succeeded on.
- [31] I assume Mr. Grewal does not know Mr. Maller, last night, listed the Burgess Property for sale while Mr. Maller has no authority whatsoever to do that. Mr. Maller's behaviour represents potential contemptuous behaviour and is almost certainly obstructive.
- [32] My concern is that on Mr. Maller's behalf, Mr. Grewal submitted a request to appear without explicitly seeking an extension of time, and without stating the basis or facts upon which Mr. Maller says the orders should be set aside. The mere fact that Mr. Maller got new counsel, given the history of this litigation, is insufficient to justify granting any extension of time.
- [33] I am very concerned about the real and grave prejudice to Ms. Kilinnik to which she deposed in her affidavit. She has already faced the prejudice of not realizing upon the successful judgment issued in August 2023 despite no stay being granted. It is important to note that the Trial RFJ affirmed a consent order Mr. Maller entered into while represented by counsel. That consent order required him to pay a large sum of money to Ms. Kilinnik. She has yet to receive any money from him.
- [34] I am satisfied based on the evidence that Ms. Kilinnik is in a situation of dire financial need, and has been, for some time. Despite that, she has always done the right thing by coming to court seeking orders to assist her.
- [35] Based on all the circumstances set out in this judgment, and my knowledge of this file, I find that Mr. Maller has, and is actively, thwarting Ms. Kilinnik's ability to realize upon the judgments granted in her favour.
- [36] For all those reasons, I make no changes to the March 13, 2024 Order, including not extending any timelines.

[SUBMISSIONS FROM COUNSEL]

- [37] Mr. Soll fairly asked whether these reasons need to be transformed into an order of the court.
- [38] This hearing was convened at my insistence in order to give an opportunity for Mr. Maller and/or his counsel to address concerns I have with the online request to appear filed by Mr. Grewal. Specifically, I wanted to ensure that Mr. Maller be given a chance himself or through counsel to assist me to understand why no application for an extension to the timelines set in the March 13, 2024 Order has been sought especially given that there is no indication of what facts could support the request for an extension of time.
- [39] It is important to emphasize that the March 13, 2024 hearing date was requested and confirmed by Mr. Maller (when represented by Mr. Tretiak). Mr. Maller was appropriately served with the March 1, 2024 application. I have no evidence nor even information on why Mr. Maller did not get a lawyer sooner and why he himself did not appear on March 13 or March 15, 2024 hearings.
- [40] It was out of an abundance of caution and out of a concern about fairness to Mr. Maller that I convened this hearing. Given that, and the fact that Mr. Maller has taken an action last night almost certainly in breach of previous court orders, there is no basis that I can see to vary any timelines in the March 13, 2024 Order notwithstanding counsel's apparent request to do so. I find it probable that injustice would be visited upon Ms. Kilinnik in these circumstances to vary anything in the March 13, 2024 Order.
- [41] Given that, I see no need for an order to be drafted for this judgment.

"Sharma J."

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