

CANADA / JUDGMENT

Kler v. Kang

2018 BCSC 1136

COURT

Supreme Court of British Columbia

DECIDED

27 June 2018

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2018 BCSC 1136 Kler v. Kang IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Kler v. Kang, 2018 BCSC 1136 Date: 20180627 Docket: E180416 Registry: Vancouver Between: Arshbir Singh Kler Claimant And Ajeet Kaur Kang Respondent Before: The Honourable Mr. Justice Mayer Oral Ruling on Application Re: Notice of Family Claim In Chambers Counsel for Arshbir Kler: P. Daykin, Q.C. B. St. Pierre Counsel for Ajeet Kang: L. Kahn, Q.C. C. Chisholm C. Lee (A/S) Place and Date of Hearing: Vancouver, B.C. June 20, 2018 Place and Date of Ruling: Vancouver, B.C. June 27, 2018

- [1] THE COURT: These are my reasons in the application of the respondent, Ms. Kang, to set aside the notice of family claim filed by the claimant, Mr. Kler.

Background

- [2] The respondent, Ms. Kang, applies to set aside the notice of family claim filed by the claimant, Arshbir Kler, on February 14, 2018. In his notice of family claim, Mr. Kler seeks an order for divorce and an order setting aside or varying a separation agreement entered into between the parties on June 29, 2016, and other relief, including the division of family property and debt.
- [3] The parties were married on May 25, 1991, and separated on May 29, 2016. There are two children of the marriage, aged 16 and 20. The parties agreed to the terms of a settlement agreement with the assistance of counsel, and the separation agreement was filed by Ms. Kang on August 31, 2016, under Supreme Court action number E162516.
- [4] Ms. Kang seeks an order setting aside the notice of family claim filed by Mr. Kler, action E180416, on the basis that it constitutes an impermissible parallel proceeding pursuant to Rules 3-1 and 4-1 of the Supreme Court Family Rules, and that the relief sought with respect to the settlement agreement is not brought in compliance with Rule 10-5(1) and 10-5(2) of the Rules, which she contends required Mr. Kler to bring an application to set aside or vary the terms of the separation agreement under the original action, being E162516.

- [5] Ms. Kang relies upon the decision of the Court of Appeal in *Halliday v. Halliday*, 2015 BCCA 82 and asserts that as a litigation had already been commenced by the filing of the separation agreement, there was no authority under the Supreme Court Family Rules for Mr. Kler to file the notice of family claim, a parallel action concerning the same subject matter.
- Analysis and Decision
- [6] In my view, although her argument is a technical one, Ms. Kang is correct. A notice of family claim should not have been filed by Mr. Kler. Mr. Kler should have sought relief under the action which was initiated by Ms. Kang.
- [7] I will now set out the relevant rules and their application to the case at bar. Ms. Kang filed the separation agreement attached to a requisition pursuant to Rule 2-1. Rule 3-1(1) makes it mandatory for every family law case to be commenced by filing a notice of family claim under Rule 4-1 unless any of subrules 3-1 (2.1) to (2.4), (4.1), (4.4) and (4.5) apply. Subrule (4.1) provides that filing of a requisition to which a separation agreement is attached, where there is no existing family law case starts a family law case. Accordingly, by filing the separation agreement, Ms. Kang started a new family law case under action number E162516.
- [8] Where a litigation has already been commenced by the filing of a separation agreement, there is no authority under the rules for issuing a notice of family claim: *Halliday*, at para. 62.
- [9] By filing a notice of family claim (E180416) rather than seeking relief under the existing action (E162516), Mr. Kler breached the Rules. In addition, Rule 10-5(1)(a) requires that a party applying for an order referred to in subrule (2), which includes, pursuant to subrule (2) (c), orders to set aside or replace the whole or any part of a settlement agreement, must (emphasis on must) make an application in accordance with Rule 10-6. The procedure set out in Rule 10-5 is mandatory: *Halliday*, at para. 59.
- [10] Mr. Kler contends that this case is distinguishable from *Halliday*. I respectfully disagree. The reasons of Justice Goepel are clear and binding on this court. In addition, Mr. Kler relies upon the decision of Justice Humphries of this court in *Carreiro v. Carreiro*, 2015 BCSC 1901, for the proposition that the Rules favour allowing his action to proceed. Although Justice Humphries exercised her discretion pursuant to Rule 1-3 to allow a claim to dismiss a settlement agreement to continue, she specifically stated in her reasons that she was not ruling on the question of whether the claim should have been brought as an application pursuant to Rule 10-5(1) and (2).
- [11] Mr. Kler points to Rule 1-3, which provides that the object of the Rules is to, amongst other things, help the parties secure a just, speedy and inexpensive determination of every case on its merits. He contends that Rule 1-3 supports his contention that the notice of family claim should be allowed to continue as, given the complexity of the dispute with respect to the legitimacy of the settlement agreement, that a trial would be a most effective way to resolve it. In addition, he seeks other relief, including a divorce. I note that Ms. Kang does not object

to the divorce proceeding itself. In my view, the requirement under Rule 10-5 that a challenge to a settlement agreement is to be brought by way of application reflects the objects set out in Rule 1-3; that is, to require disputes with respect to a filed settlement agreement to be resolved summarily by application rather than by trial.

- [12] Given that the filing of the notice of family claim by Mr. Kler was done in breach of the Rules, it is within the court's power pursuant to Rule 21-5(1)(a)(i) to strike out the notice of family claim filed by Mr. Kler under action number E180416 or to set aside any steps taken in the proceeding pursuant to Rule 21-5(1)(c). In the circumstances and pursuant to Rule 21-5(e), which provides the court with the ability to make any orders that it considers will further the object of the Rules, I consider it appropriate to strike the portions of Mr. Kler's claim which are set out in family claim action number E180416 except the claim for divorce, which may proceed under that action number.
- [13] Mr. Kler is, of course, at liberty to bring an application to vary or asset aside the settlement agreement and for the other relief sought in the proceedings commenced by Ms. Kang under action number E162516. He is also, of course, at liberty, and the decision is his to do to, so seek to apply for an order that this application be referred to the trial list or for any other procedural steps, including examinations for discovery which he considers may be beneficial. Costs
- [14] With respect to costs, in the circumstances, given that she has been successful in her application, costs are to the respondent, Ms. Kang. "Mayer J."

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