

CANADA / JUDGMENT

Kosky v. Bratkowski

2022 BCSC 103

COURT

Supreme Court of British Columbia

DECIDED

21 January 2022

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2022 BCSC 103 Kosky v. Bratkowski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kosky v. Bratkowski,

2022 BCSC 103

Date: 20220121

Docket: E14760

Registry: Campbell River

Between:

Kiyoshi Hayter Kosky

Claimant

And

Christy Louise Bratkowski and Joe Bratkowski

Respondents

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Claimant:

K. Stevan

Counsel for the Respondents:

K. Sugiyama

Place and Date of Hearing

(via videoconference):

Courtenay, B.C.

January 6, 2022

Place and Date of Judgment:

Campbell River, B.C.

January 21, 2022

INTRODUCTION

- [1] The claimant, Kiyoshi Kosky, and the respondent, Christy Bratkowski, began living together in 2004, were married on September 13, 2008, and separated on August 18, 2020. The pleadings in their family law case closed on February 3, 2021. They came to a mediated resolution of their differences in the summer of 2021. The respondent now brings this summary trial application for a divorce order and orders enforcing the parties' mediated settlement agreement.
- [2] The respondent Joe Bratkowski is Christy Bratkowski's father. He was named in the litigation only because a company which he controls owns a motor vehicle that the parties used for family purposes. The application before the court does not involve him. When I refer to the "respondent", I mean Christy Bratkowski.

BACKGROUND

- [3] The parties' mediation proceeded on May 26, June 4 and July 2, 2021. A comprehensive and final agreement was reached on all matters, including guardianship of their 4-year-old daughter, parental responsibilities, parenting time, child support, spousal support and property and debt division. Minutes of settlement were drafted and exchanged. The final version ("the settlement agreement") was signed and confirmed by counsel for both parties on August 24, 2021.
- [4] The settlement agreement required the respondent to refinance the matrimonial home so that she could buy out the claimant's interest in it and pay him compensation for his share of value in the motor vehicle mentioned above for a total of \$105,000 ("the settlement amount"). This was part of an overall property and financial deal whose centrepiece, no doubt about it, was the respondent's retention of the matrimonial home, which the parties agreed for settlement purposes was worth \$682,000.

- [5] In order to secure this result, the respondent offered some solid concessions. On top of the settlement amount, she assumed all costs associated with the matrimonial home, including payment of a mortgage with an outstanding balance of over \$400,000; she accepted sole responsibility for all other family debts totalling over \$80,000; she transferred \$5,000 in RRSP holdings to the claimant; she paid the claimant lump sum spousal support of \$10,000; and she waived her share of the claimant's \$46,000 in RRSPs.
- [6] In other words, the settlement agreement was the usual sort of family law compromise in which assets and liabilities were mixed and reapportioned according to the parties' respective needs and ambitions. I would emphasise that the whole process was managed and brokered by a professional mediator and overseen by experienced counsel giving independent advice to each litigant at every step, the same counsel, in fact, who have appeared on the present application. There is no doubt at all that a binding and enforceable agreement was struck. In my view, moreover, there was nothing at all unfair about it.

AFTER THE AGREEMENT

- [7] The minutes of settlement provided that the respondent would pay the settlement amount "as soon as she is able to do so, and no later than September 15, 2021." The respondent says that, with the assistance of her father, she was pre-approved for financing to complete before September 15, 2021, but her lending institution, Scotiabank, insisted on receipt of a consent order incorporating the terms of the settlement agreement before it would disburse the necessary funds. In my experience this kind of requirement is not unusual.
- [8] The respondent drafted the consent order, as the minutes of settlement required, but by the time it was delivered to the claimant it was already September 12, 2021. By that time, I find, it was too late for strict compliance with the September 15, 2021 deadline. Unhelpfully, as well, the respondent added new terms in the consent order about parenting time at Christmas and on the parties' respective birthdays. I doubt these things were contentious, but in family cases it often leads to problems when one party appears to be improvising with terms of a carefully structured compromise agreement absent the input and consent of the other. This is especially so where a child is concerned. This is what seems to have happened here.
- [9] The draft order also provided that the transfer of the matrimonial property was to be completed within 30 days, which amounted, in effect, to the respondent's unilateral introduction of a month long delay in payment of the settlement amount to which the claimant had not agreed. From all the circumstances, I infer that these ill-advised additional terms in the consent order, combined with the claimant's developing perception that he had made a bad financial deal, resulted, ultimately, in his refusal to sign the order. To this day the matrimonial home remains registered in the parties' joint names and the claimant has not been paid the settlement amount.

- [10] At first, the claimant demanded compliance with the September 15, 2021 payment deadline. But then, notwithstanding his understandable irritation with the respondent's embroidering of the consent order, and despite his present claims that the delay caused him financial stress and hardship, he agreed to a month long extension for payment of the settlement amount. On October 28, 2021 - there was no explanation for the additional delay - the respondent delivered a subsequent draft order removing the minor parenting amendments and committing her to payment of the settlement amount within a week. The claimant refused to sign it, and to this day has not done so.

DISCUSSION

- [11] The respondent maintains, and I am prepared to accept, that the required financing to complete the settlement agreement continues to be immediately available, and all the necessary property transfer documents are ready for signature and prompt registration. It is important to note, as well, that in every other respect the settlement agreement has been implemented and is operating successfully. The parties are co-parenting their child without any difficulty. The respondent is paying monthly child support on time and in full. She is covering all the costs associated with the matrimonial home. She has transferred her undivided RRSP accounts to the claimant. She has paid the \$10,000 in lump sum spousal support. She has assumed responsibility for the parties' debts and made no claim on the claimant's RRSPs.
- [12] It is well known that the price of real estate in our local area has been climbing quite sharply in recent years. The claimant's reason for refusing to sign the consent order is that, in his estimation, the settlement agreement has become significantly unfair to him because of the delay in payment of the settlement amount, resulting in a deprivation of funds due to him in equity accrual during the interval. I should specify that this position is premised on a valuation of the matrimonial home done by a professional appraiser on November 18, 2020. He is holding out for a share of the rise in the value of the matrimonial home between the date of the appraisal and today, not since the settlement agreement was signed at an agreed value of \$682,000.
- [13] I find that the claimant knew the property had likely risen in value before the settlement agreement was reached some 9 months after the appraisal was completed, but he agreed to the payout amount anyway, doubtless because the difference was not worth quarreling about, and in any event the respondent committed to compensating him in other ways that he, and his lawyer, obviously found satisfactory. It is to be repeated and emphasised that the settlement agreement came from a lengthy process of negotiation and mediation in which both parties enjoyed competent professional assistance. There has been no suggestion of any impropriety in the negotiation or execution of the agreement, or of inadequacy in the legal advice received, or of financial non-disclosure, or that the parties were not fully aware of the agreement's content and implications.

- [14] Taking account, especially, of the claimant's agreement to a month-long extension for payment of the settlement amount after September 15, 2021, only the delay between mid-October and the summary trial date on January 6, 2022 is eligible for consideration in evaluating the claimant's argument about significant unfairness. This is a period of 12 weeks. I have no evidence to establish the amount of any difference in the value of the matrimonial home in that time, but I doubt it amounts to much. The brevity of the interval in question is what distinguishes the present case from *Quan v. Quan*, 2017 BCSC 2458, where a similar matrimonial property payout provision remained unpaid for over two years in a rapidly rising market to the obvious and marked prejudice of the payee.
- [15] That is not the case here. In my view there is not the slightest doubt that the parties entered into a fair, equitable, valid and enforceable contract. There was some minor delay in finalising the minutes of settlement while drafts were exchanged, but this is par for the course. I conclude that the regrettable delay thereafter in completing the settlement agreement must be shared between the parties. The original deadline set for payment of the settlement amount was impracticable. A longer turnaround was required to perfect the necessary financing arrangements. Matters were not helped, as I have said, by the respondent writing improvisations into the consent order to which the claimant had not agreed.
- [16] However, when in reasonably short order this error in judgment was corrected and reversed, the claimant misguidedly held things up by insisting on a larger settlement payout than he had recently agreed to. He has suggested no legally compelling argument justifying this position. There is inadequate evidence to support his contention that the settlement agreement, looked at in its totality, has become significantly unfair because of the effluxion of time. I reject any suggestion that the respondent has repudiated the settlement agreement. I find that her fixed intention throughout has been to complete it within a reasonable compass.
- [17] I agree with the observations of this court in *Merke v. Merke*, 2003 BCSC 1070 at para. 36, to the effect that, if every minor failure of immediate and complete performance in a case such as this were to constitute repudiation, a substantial percentage of family law agreements would be put asunder. I repeat, as well, that every other aspect of the settlement agreement has gone into operation, including substantial financial terms which benefit the claimant and represent concessions made by the respondent. The respondent has not been dragging her feet or exploiting any kind of advantage. She remains ready, willing and able to pay the settlement amount which the claimant, only a matter of weeks ago, agreed to accept in full satisfaction of his financial claims against her. I have concluded that this is precisely what must happen. I might emphasise that the result would be the same if the value of the property could be shown to have decreased.

DISPOSITION

- [18] I am satisfied, first of all, that the prerequisites for a divorce have been established in evidence. I hereby order under s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) that the parties are divorced from each other effective on the 31st day after the date of this judgment.
- [19] In addition, I hereby declare that the parties reached a valid, binding and enforceable settlement agreement by signing the minutes of settlement after their mediation. These minutes are accurately reflected in the final draft order sent to the claimant on October 28, 2021, whose every term I hereby adopt and order.
- [20] The respondent's counsel will be responsible for submitting the order for entry. All necessary documents to effect the transfer of the matrimonial home are to be presented to the claimant forthwith. He will sign and return those documents to the respondent within 72 hours of receipt.
- [21] Thereafter the respondent is to pay the settlement amount to the claimant as soon as practicable and in any event by no later than 4:00 p.m. on Friday, February 11, 2022.
- [22] As I said, the parties are jointly responsible for the unnecessary delay in settling their matrimonial affairs. I hereby exercise my discretion to order no costs.

"Baird J."

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