

CANADA / JUDGMENT

Li v. Narejko

2024 BCSC 1815

COURT

Supreme Court of British Columbia

DECIDED

30 August 2024

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2024 BCSC 1815 Li v. Narejko

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Li v. Narejko,

2024 BCSC 1815

Date: 20240830

Docket: E220129

Registry: Vancouver

Between:

Simon Li

Claimant

And

Malgorzata Julia Narejko

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 33 on October 9, 2024

Before: The Honourable Justice Giaschi

Oral Reasons for Judgment

In Chambers

The Claimant, appearing in person:

S. Li

The Respondent, appearing in person:

M. Narejko

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 16 and August 26, 2024

Place and Date of Judgment:

Vancouver, B.C.

August 30, 2024

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THE COURT: I reserve the right to amend these reasons for grammar and clarity should they be ordered, and to provide full citations and quotations. However, the result will not change as a consequence of any such amendments.

Introduction

- [1] The claimant applies to enforce an alleged settlement agreement settling all matters in dispute in this family law action. He submits that on February 20, 2024, he and the respondent's counsel, Mr. Karan Banipal, came to terms on a full and final settlement agreement based, in part, on a formal offer to settle that had previously been delivered by the respondent. The full terms of that alleged agreement I will address below. One of the terms was that the claimant was to pay \$6,000 in lump-sum spousal support to the respondent.
- [2] The respondent opposes the application and denies that a settlement agreement was reached on February 20. She makes various arguments. First, she says that the formal offer that had been made had expired and could not be accepted on February 20. Second, she says that Mr. Banipal did not have authority to settle the matter on the alleged terms and that he acted contrary to her instructions. Third, she argues that she expressly told the claimant and Mr. Banipal that the formal offer was off the table, that she required \$12,000 in spousal

support, and that she would not accept anything less. Fourth, she argues that any settlement was invalidated by duress or undue influence. And finally, she argues that the settlement, if any, is unfair.

- [3] A similar application was filed by the claimant on April 12, 2024. That application came on for a hearing before Justice Francis on June 5, 2024. Justice Francis dismissed the application but gave the claimant leave to file a fresh application, the one that is now before me. Justice Francis ordered that the new application "must be scheduled for a one-day hearing with a half-day set aside for cross-examination on affidavits." She further adjourned several pending applications and ordered that no other applications could be filed by the parties until the validity of the alleged settlement agreement was determined.
- [4] As Justice Francis ordered that there be cross-examinations on affidavits, seemingly at the hearing of the new application, I permitted each of the parties to cross-examine the other party during the hearing before me. I note that ordinarily such cross-examinations should have been done beforehand at a court reporter's office. However, the parties were self-represented and were unaware of this usual practice.
- [5] A further unusual aspect of this application is that Mr. Banipal, the respondent's counsel at the time of the alleged settlement agreement, was served with a notice of intention to call an adverse party as a witness by the respondent. In response to that notice, and despite the fact that it was not a subpoena, Mr. Banipal attended at the hearing. The respondent advised that she wished to examine Mr. Banipal. Again, because the parties were self-represented, and given the potential importance of the issue and the extent of Mr. Banipal's involvement, I permitted both parties to question Mr. Banipal under oath.

Legal Principles

- [6] Before addressing the facts, I observe that s. 6 of the Family Law Act applies in this matter. In summary, it provides that parties to a family law dispute may make an agreement to resolve a family law dispute and that such an agreement is binding.

6 (1) Subject to this Act, 2 or more persons may make an agreement

- (a) to resolve a family law dispute, or
 - (b) respecting
 - (i) a matter that may be the subject of a family law dispute in the future,
 - (ii) the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the future, including the type of family dispute resolution to be used, or
 - (iii) the implementation of an agreement or order.
- (2) A single agreement may be made respecting one or more matters.

- (3) Subject to this Act, an agreement respecting a family law dispute is binding on the parties.
 - (4) Subsection (3) applies whether or not
 - (a) there is consideration,
 - (b) the agreement has been made with the involvement of a family dispute resolution professional, or
 - (c) the agreement is filed with a court.
 - (5) A child who is a parent or spouse may enter into and be bound by an agreement, including an agreement respecting the division of property or debt.
- [7] In *Brown v. Etchells*, 2021 BCSC 1432 at paras. 18-23, Justice Mayer addressed s. 6 and summarized some of the applicable law. He noted that a separation agreement is subject to the ordinary law of contract and that its validity does not depend on the subjective intention of the parties, but on whether an objective reasonable bystander would, in consideration of all the relevant facts, consider the parties intended to contract.
- [20] As set out by the British Columbia Court of Appeal in *Berthin v. Berthin*, 2016 BCCA 104, the test to determine whether an agreement is valid does not consider the parties subjective intention but rather, whether an objective reasonable bystander would, in consideration of the relevant facts, consider that the parties intended to contract. In addition as set out in *Berthin* a court will not seek to enforce what is effectively an agreement to agree: *Berthin*, at paras. 46, 48.
- [21] As succinctly stated by Justice Ehrcke at para. 37 of *Chepil v. Chepil*, 2006 BCSC 15:
- A separation agreement is a contract and is subject to the ordinary law of contract that applies to other agreements. Like any other contract, a separation agreement may be challenged on the basis of duress, undue influence, unconscionability, fraud, or non-disclosure.
- [22] Duress may include physical threats or threats of imprisonment or economic duress, the latter requiring a degree of coercion which impacts voluntariness: *Chepil*, at para. 40.

Issue

- [8] The primary question before me is whether the parties objectively intended to contract and did contract to settle all matters in dispute in this family law action. In my view, they did.

Facts

- [9] The relevant facts are as follows.
- [10] This matter was originally set for trial to commence on February 20, 2024.
- [11] In January of 2024, the respondent retained Mr. Banipal as her counsel through legal aid.

- [12] On January 19, 2024, Mr. Banipal emailed the claimant advising him of his retainer on behalf of the respondent.
- [13] On February 15, 2024, Mr. Banipal sent a formal offer to settle pursuant to Rule 11-1 of the Supreme Court Family Rules to the claimant. In summary, the terms of that offer were:
- a) the claimant was to obtain an uncontested divorce order at his cost and expense;
 - b) the claimant was to make a lump-sum payment of spousal support to the respondent in the amount of \$6,000 by September 21, 2024;
 - c) the claimant was to make a payment of \$21,000 to the respondent in respect of property and debt division by March 31, 2024;
 - d) the claimant was to transfer the wedding ring to the respondent by February 15, 2024;
 - e) the parties' CPP pensions for the period of January 11, 2017, to November 1, 2020, were to be equalized;
 - f) the claimant's Canadian Armed Forces pension was to be equally divided for the period from January 11, 2017, to November 1, 2020;
 - g) the respondent's Irish permanent pension plan was not to be divided; and
 - h) all other claims were to be dismissed.
- [14] The formal offer did not contain any date by which it had to be accepted or a date of expiry. However, the covering email stated, "Here is our formal offer. Please advise immediately if you accept."
- [15] It is common ground that the claimant did not accept the formal offer before attending at court for the trial on February 20, 2024.
- [16] When the parties did attend at court for the trial on February 20, they were told that there was not a judge available. They then attended at the registry to schedule a new trial date.
- [17] According to the claimant, the following then transpired:
- a) Mr. Banipal suggested to him that they try to settle the matter. He agreed to attempt a settlement and they moved to a back room;
 - b) The claimant and Mr. Banipal discussed \$13,000 in spousal support payments that had been previously paid by the claimant to the respondent. The claimant asked Mr. Banipal why those amounts had not been included in the offer to settle, as he wanted to be able to claim the payments in his income taxes. The claimant says Mr. Banipal agreed to acknowledging these support payments in the settlement;

- c) The claimant deposes that Mr. Banipal then went to speak with the respondent and, after speaking with her, came back and asked him if he would pay more in spousal support than was set out in the offer. The claimant says he replied that he would not;
 - d) Mr. Banipal then again went back to speak with the respondent. When he returned, Mr. Banipal asked the claimant whether he was willing to speak with the respondent in person. He initially said no, but then agreed to do so;
 - e) The claimant and respondent then met separately. The claimant says the respondent asked him whether he truly wanted a divorce and said she believed he still loved her. He disabused her of this idea in language that I will not repeat. Thereafter, he says the respondent returned to her counsel;
 - f) Mr. Banipal then came to him and told him the offer to settle was still on the table, and asked him if he would accept it;
 - g) The claimant then says he expressed concerns about previous attempts at settlement where the respondent had backed out. He asked Mr. Banipal what happens if he agreed. Mr. Banipal told him the matter would be over;
 - h) The claimant then said to Mr. Banipal, "I agree," and the two of them shook hands;
 - i) Mr. Banipal then went to the respondent and informed her;
 - j) While walking back from the courthouse around noon, the claimant asked Mr. Banipal to draw up the required documentation and Mr. Banipal advised he would do so;
 - k) According to the claimant, the next thing that transpired is that at 3:56, or 4:56 Calgary time, Mr. Banipal sent an email saying he was no longer retained;
 - l) The claimant then drafted a final order encompassing the terms of the offer to settle, with the addition of a clause acknowledging the \$13,000 in support payments that had been made between November 1, 2021, and November 1, 2022;
 - m) The claimant forwarded this proposed final order to the respondent;
 - n) The respondent replied with an email on February 22. In the email, she said, "My understanding is that my formal offer had been revoked and you were presented with an informal one." She also attached a revised final order. The respondent's amendments to the draft final order related solely to support; specifically, the amount of support was increased to \$12,000 payable in 12 monthly instalments.
- [18] The respondent deposes to a similar series of events on February 20, but with important differences. Importantly, she deposes that on February 20, 2024, she said to the claimant in the presence of Mr. Banipal that her formal offer was "off the table" and that if he wanted to settle with her, he would have to pay \$12,000 in support. She also says that she never instructed Mr. Banipal to agree to \$6,000 in support. To the contrary, she says that after she and the respondent met separately, she returned to Mr. Banipal and told him she required

\$12,000 in support payments.

- [19] I accept the claimant's evidence of what transpired on February 20, 2024, and find that the parties agreed to a settlement of this action on the terms set out in his draft final order.
- [20] First, the claimant's evidence is corroborated by the emails exchanged by the parties on February 22, 2024. Most significantly, the respondent's email of February 22, 2024 did not dispute that an agreement had been reached. Rather, she said the claimant had been presented with an informal offer. I infer from this that she knew an agreement was made, but that she presumed it was somehow informal or not binding.
- [21] Secondly, and more significantly, the evidence of Mr. Banipal, whom the respondent called as a witness, completely corroborates the claimant's version of events. In summary, Mr. Banipal's evidence was:
- a) The formal offer delivered to the claimant on February 15, 2024, had no expiry date;
 - b) He acknowledged that the respondent initially insisted on \$12,000 in additional support payments. However, after discussions with her, she eventually instructed him to ask for \$6,000 in support, as in the offer;
 - c) He was never asked by the respondent to revoke the formal offer, did not understand that the respondent wanted the offer revoked, and never heard her say to the claimant that the offer was revoked;
 - d) He acknowledged that on February 20, 2024, the respondent asked him to attempt to try to obtain a higher support amount from the claimant. He testified that he attempted to do so, but the claimant refused to agree to more;
 - e) He acknowledged that in his discussions with the claimant on February 20, 2024, the claimant wanted to include the previous \$13,000 in support payments in the settlement for tax purposes. He told the respondent this and she agreed;
 - f) He acknowledged that after discussing with the respondent, he put the terms of the formal offer to the claimant with the addition of the inclusion of the prior support payments and the claimant accepted;
 - g) He acknowledged that the parties came to a binding agreement on February 20, 2024;
 - h) He did not agree that he told the respondent he would withdraw if she did not reduce the support request to \$6,000;
 - i) He did not agree that he told the respondent the formal offer was only good for 21 days;
 - j) He did not agree that his retainer with the respondent was limited to issues of spousal support and family violence;

- k) He did not agree that he told the respondent he owed duties to legal aid as opposed to the respondent;
- l) He did not recall the respondent telling him that the offer of settlement was to be revoked if the trial did not proceed, and he never heard the respondent tell the claimant that her offer was off the table;
- m) Once the trial was bumped, he stayed on as counsel for the respondent. He was not fired by the respondent and he did not then withdraw as counsel. He testified that the respondent wanted him to remain involved to have discussions with the claimant.

Analysis

- [22] The respondent makes two broad submissions. First, she submits that the formal settlement offer was expired or withdrawn and was not capable of acceptance. Second, she submits that Mr. Banipal did not have authority to settle the matter on February 20, 2024, and did so contrary to her instructions. I do not accept either of these submissions.
- [23] The settlement offer made on February 15 did not have an expiry date. It was a formal offer made under the Rules and it was capable of being accepted at any time prior to judgment. In any event, the February 15 formal offer was not the accepted offer. Rather, the evidence of the claimant and Mr. Banipal is that on February 20, 2024 they discussed and agreed on a modification of the February 15 offer. Specifically, the inclusion of a clause that the support payments made in the amount of \$13,000 would be specifically addressed in the agreement and acknowledged as support payments.
- [24] Concerning the submission that Mr. Banipal did not have instructions or authority to settle the matter, this submission is wholly without merit. First, I accept Mr. Banipal's evidence which is consistent with him having express authority and express instructions. Secondly, as the respondent's counsel, he had ostensible or apparent authority to act on her behalf and to settle the matter with the claimant on her behalf. Importantly, there is no evidence suggesting that the claimant was ever told of any limitations on Mr. Banipal's authority.
- [25] The respondent additionally submits that she told the claimant and Mr. Banipal that she required \$12,000 in spousal support and would not accept anything less. This is refuted by the claimant and Mr. Banipal and I find as a fact that she made no such statement.
- [26] The respondent additionally argues that any settlement was invalidated by duress or undue influence. This submission is also without merit. The respondent does not point to anything that the claimant did on February 20 that could amount to duress or undue influence on his part. Moreover, the settlement discussions were predominantly between the claimant and Mr. Banipal. There was only one occasion where the claimant and respondent discussed matters separately and privately, and they did not discuss settlement terms, but whether they should get back together. There was simply no duress or undue influence by the claimant.

[27] Finally, the respondent says the settlement terms are unfair or unconscionable. I disagree. It was the respondent who was represented by counsel on February 20, not the claimant. The terms of the settlement agreed to were virtually identical to what had been offered by the respondent on February 15. The difference between the accepted offer and what the respondent now seeks is only \$6,000. That is not a significant amount, even for the parties.

Conclusion and Orders

[28] Accordingly, I find that the parties did agree to settle all matters in dispute in this family law case on February 20. I further find that the terms of that settlement are properly recorded in the draft order of the respondent sent to the claimant on February 21, which is included in the Li affidavit #15 filed February 21, 2024, as page 18 of Exhibit C.

[29] However, due to the respondent's wrongful repudiation of that agreement, the dates set out in that draft order obviously can no longer apply and need to be amended and also the spousal support. I am thinking specifically of the compensation payment which was to be made by March 31, 2024, and which date has obviously expired.

[30] [Submissions on the date by which the compensation payment should be made.]

[31] THE COURT: All right. I am going to order that the payment be made within 45 days because that somewhat aligns with the amount of time that the claimant would have had under the original agreement.

[32] [Submissions on the amount of lump sum spousal support.]

[33] The lump sum spousal support of \$6,000 is adjusted to take into account support payments made from February 15 to August 15, 2024. The revised amount of lump sum support is \$4,200. This is to be paid by September 13, 2024.

[34] [Submissions on costs.]

[35] THE COURT: The claimant shall have the costs of this application and, if the parties cannot agree, those costs are to be assessed by the taxation officer.

"Giaschi J."

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