
CANADA / JUDGMENT

M.N.1 v. T.N. & Others

2004 BCSC 743

COURT

Supreme Court of British Columbia

DECIDED

3 June 2004

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

M.N.1 v. T.N. & Others

2004 BCSC 743

Date: 20040603

Docket: S0010762

Registry: Chilliwack

Between:

M.N.1

Plaintiff

And

T.N., R.D., M.N.2,

I.S. and C.[] Ltd.

Defendants

Before: The Honourable Mr. Justice Chamberlist

Reasons for Judgment

Counsel for the plaintiff:

D.W. Blinkhorn

Counsel for the defendants R.D. and M.N.2:

R.W. Johnson

Date and Place of Hearing:

March 16, 2004

Vancouver, B.C.

INTRODUCTION

- [1] In these proceedings the plaintiff has returned its notice of motion, filed April 8, 2003, seeking summary judgment pursuant to the provisions of R. 18A, seeking judgment against the defendants R.D. and M.N.2 each in the sum of US \$105,000.00 plus interest with the alternative relief being that the aforesaid defendants each pay into court the sum of US \$105,000.00 and interest thereon to the credit of proceeding S06603, New Westminster Registry, described as M.N.1 v. T.A.N. a.k.a. T.N..
- [2] The history of this litigation and the matrimonial proceeding in New Westminster Registry S06603 is somewhat complex. The initial R. 18A application came before Madam Justice Brown in Chilliwack on July 22, 2003. At that time judgment was sought but because of some misunderstanding between counsel for the plaintiff and the two defendants' then counsel, Mr. Sandilands, the matter, by agreement, did not proceed to judgment, but rather it would appear that the only issue that was placed before Madam Justice Brown for determination was whether or not the two defendants received certain funds. Her Ladyship determined that the defendants R.D. and M.N.2 had, in fact, received the funds in questions.
- [3] By way of further background, the matrimonial litigation in action number S06603 was concluded in reasons for judgment rendered by Mr. Justice Fraser on December 1, 1997, following a 15 day trial between the plaintiff, in this action, and her then husband T.N..
- [4] One of the issues in that action was the entitlement to the proceeds of a property in which Mr. T.N. had a one-half interest, but which one-half interest was sold by him prior to a triggering event under the Family Relations Act having occurred. At paras. 52 and 53 of Mr. Justice Fraser's decisions, he made the following findings with respect to that interest:

H.[] Mall

- [52] There is no question but that the H.[] shopping mall was a business asset to which Ms. M.N.1 made both an indirect and a direct contribution. Both J.[] and S.[] were mortgaged to finance its purchase. Ms. M.N.1 contributed time and work to its operation. More generally, she handed over her pay cheques to Mr. T.N. throughout the marriage and I find that she made a financial contribution to the purchase of all the assets acquired during the marriage.
- [53] I find as a fact that Mr. T.N. had a full, one-half interest in the H.[] Mall from the beginning and sold his interest on that basis. The proceeds are a family asset.

- [5] At para. 60, Mr. Justice Fraser found that the interest of the plaintiff in the proceeds of the H. [] Mall, as at date of trial, was \$204,730.59.
- [6] Justice Fraser went on to order, in the matrimonial proceedings, that as the plaintiff's interest in value of the proceeds could not be transferred, that a vesting order in her favour over the former matrimonial home occur. At para. 63 he states:
- [63] . . . reflecting my conclusion that she is entitled to one-half of that home as a family asset and my further finding that she is entitled to be compensated for one-half of the H. [] Mall proceeds. If there continues to be a shortfall, there may need to be a money judgment in her favour, as well. This probably means that a value must be developed for S. [] .
- [7] I note at this time the observation of counsel for the defendants that there has never been a value developed for the S. [] property at the time of trial.
- [8] A concise statement of the matrimonial litigation and the evidence placed before Madam Justice Brown is found at paras. 1 to 3 of her decision of July 22, 2003:
- [1] THE COURT: In 1996, Mr. and Mrs. M.N.1 were engaged in matrimonial litigation in this court. Mr. T.N. and his brothers, R.D. and M.N.2, gave evidence in that action that certain property was owned by them, one-third each, that proceeds of sale from that property had been paid out in equal portions to each of the three brothers.
- [2] Mr. Justice Fraser heard that action. He did not believe the brothers regarding ownership of that property. He concluded that the property that was owned by Mr. T.N. was matrimonial property. He made no finding as to whether the proceeds of sale had been received by the brothers.
- [3] In the action before me, Mrs. M.N.1 is attempting to follow the sales proceeds from the property as family assets. She is seeking return of the assets from Messrs. R.D. and N.. She says that their evidence before Mr. Justice Fraser is binding on them or should be accepted by me in any event. The brothers say that I should reject their evidence before Mr. Justice Fraser and should prefer the affidavit evidence before me, that I cannot conclude that they received the sale proceeds.
- [9] The decision of Mr. Justice Fraser finding the sale proceeds to be a family asset with the plaintiff being entitled to one-half of the value at trial has not been appealed. The decision of Madam Justice Brown finding that the monies had been received by the two defendants is under appeal.
- [10] Mr. Justice Fraser, at para. 24 of his reasons, made these findings with respect to the proceeds of the H. [], which were found to be family assets by him:
- [24] Near the date of the final separation of Mr. and Ms. M.N.1, these proceeds were transferred to an account at a bank in Washington State established by a Washington company, C. [] Inc. Although unnecessary to the transaction per se, the transfer was allocated in three shares: Mr. T.N., his brother R.D. and his brother M.N.2 [sic]. One day later, the whole of the account

was depleted by three cheques written on it, in equal amounts. Each was made payable to one of the brothers jointly with someone called I.S.. None of Mr. T.N. or his brothers could explain to me in a way I understood why the cheques were made out this way. The money cannot now be traced. Mr. T.N. says that he has dissipated his share of proceeds in unfortunate investments and through personal spending.

- [11] For better clarity, the cheques referred to in para. 24 were each in the amount of US \$105,000.00 and each of the three cheques was made payable to each of the brothers, T.N., R.D. and M.N.2, and the defendant I.S..
- [12] Another significant issue from the defendants' perspective is that T.N. made an assignment into bankruptcy on August 11, 2000, and still, as at this time, remains and undischarged bankrupt.
- [13] The defendants appear to take issue with the finding of Fraser J. that the sale proceeds were a family asset because the monies were disposed of some years before the triggering event in the matrimonial action, being the granting of a divorce order some years after the sale proceeds were disbursed by the issuance of the three cheques. I am, however, bound by the findings and declarations made by Mr. Justice Fraser.
- [14] The defence also submits that the one-half amount against which the plaintiff could advance a claim in respect of each of the cheques would also be subject to further reduction, in so far as the plaintiff was granted a vesting order by Justice Fraser over the S.[] property as partial compensation to the plaintiff for her not receiving any part of the H.[] Mall proceeds.
- [15] I will deal with that issue at this point. In my view, that is a matter between the plaintiff and T.N.'s trustee in bankruptcy.
- [16] In my view there are no equities to be adjusted between the defendants in this action and the plaintiff. The defendants in this action cannot raise the necessity of such an accounting.
- [17] As such, I am of the view that it is not necessary for the plaintiff to adduce any form of accounting evidence which would be required by the court to establish the amount of any pecuniary judgment.
- [18] Mr. Justice Fraser, in his reasons, concluded that the two brothers did not have any beneficial interest in the H.[] property and, implicit in that finding, they had no right to receive any monies from the proceeds which were found to be family assets.
- [19] However, Justice Fraser did permit, in his reasons, liberty to counsel to apply for a further accounting.

- [20] I have concluded that notwithstanding that the equities cannot be argued by these defendants relative to Justice Fraser's order, the alternative relief claimed by the plaintiff in the amended outline would be appropriate. I must admit, however, that I have some difficulty with the claim that each of them pays US \$105,000.00 either to the plaintiff or into court.
- [21] T.N. could do what he wanted with his one-half interest. In *Yang v. Yang*, 2003 BCCA 473, Vancouver Registry CA029075, Madam Justice Southin, speaking for the court, said, commencing at para. 31:
- [31] That an item of property whether real or personal falls within the definition of "family asset" in s. 58 does not in and of itself affect the rights and powers of the spouse who is the owner of that property. He or she may sell it, encumber it or give it away and the purchaser, mortgagee or donee, as the case may be, will acquire the title thus conferred.
- [32] It is only upon the happening of one of the events in s. 56, commonly called "a triggering event", that the other spouse acquires an undivided one half interest as tenant in common. See *Drozdzik v. Drozdzik* (1993), 26 C.B.R. (3d) 53 (B.C.C.A.), especially at p. 71, and *Norton v. Norton* (1989), 19 R.F.L. (3d) 181 at 191 (B.C.C.A.). . . .
- [22] Notwithstanding the reference in para. 32 to the acquisition of an undivided one-half interest, I again note that the judgment of Mr. Justice Fraser appears not to have been appealed and as such I feel bound by his finding that the proceeds were family assets and his declaration that the plaintiff was entitled to one-half of those proceeds.
- [23] In this case, by the reasoning of Justice Fraser and the reasoning of Madam Justice Brown in her decision to find that the proceeds had in fact been received by the two defendants, it is implicit from the conflicting evidence provided in the matrimonial trial and in these proceedings by the defendants R.D. and N. that they were part of a conspiracy to ensure that none of the proceeds of sale of the H.[] would ever make their way into the hands of the plaintiff.
- [24] The proceeds of sale were calculated by Justice Fraser, in his reasons, and the entitlement to the plaintiff was given a monetary amount, namely \$204,730.59.
- [25] The fact that there was a conversion of that amount into American funds has, in my view, no affect on the monetary entitlement. That monetary entitlement was set by Mr. Justice Fraser. The defendants R.D. and M.N.2 received, between them, in excess of CDN \$272,000.00. Of that amount, I find \$204,730.59 was money that the plaintiff, in accordance with the reasons of Mr. Justice Fraser, was entitled to.
- [26] I therefore order that the defendants R.D. and M.N.2 jointly pay into court that amount to the credit of proceeding S06603, New Westminster Registry.

[27] I did not hear submissions on when interest should be calculated from and if the parties are unable to agree on the commencement date for the calculation of interest, then they are at liberty to make further submissions.

[28] The plaintiff shall have her costs of these proceedings on Scale 3.

"E.G. Chamberlist, J."

The Honourable Mr. Justice E.G. Chamberlist

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