
CANADA / JUDGMENT

McMillan v. McMillan

2015 BCSC 1472

COURT

Supreme Court of British Columbia

DECIDED

31 July 2015

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2015 BCSC 1472 McMillan v. McMillan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McMillan v. McMillan,

2015 BCSC 1472

Date: 20150731

Docket: E074283

Registry: Vancouver

Between:

Milena Maria McMillan

Claimant

And

Bruce Edwin McMillan

Respondent

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

Tracey L. Jackson

Elizabeth L. Lepik

Counsel for the Respondent:

Murray L. Smith

Trudy H. Hopman

Place and Date of Hearing:

Vancouver, B.C.

July 22, 2015

Place and Date of Judgment:

Vancouver, B.C.

July 31, 2015

- [1] THE COURT: Ms. McMillan asks that Mr. McMillan be found in contempt of court. Mr. McMillan asks that I stay his obligations to pay what he owes under two arbitration awards.
- [2] The contempt application is founded on the fact that Mr. McMillan has not paid all that is owing on the two arbitration awards, which are dated October 28, 2014 and December 22, 2014, respectively. The total now owing on both awards is \$665,498.14, not including post-judgment interest. Mr. McMillan has made one payment on the first award, a payment of \$250,000, on November 27, 2014.
- [3] Soon after the first award was published, Ms. McMillan began demanding payment. Over time, she wrote several letters to repeat the demand. All the letters threatened generally that all collection remedies would be employed. To the present, Mr. McMillan has made only the \$250,000 payment. He has appealed the two arbitration awards to this Court. The appeal is scheduled to be heard over three days, beginning August 19, 2015.
- [4] The procedural steps Ms. McMillan employed to convert the arbitration awards into an order of this Court resulted in the order being pronounced only on May 29, 2015. On the same date, the Court acknowledged that Mr. McMillan's stay application was imminent and would be heard with the contempt application. In the result, no matter how long Mr. McMillan has taken to pay the awards in full, and no matter how much he is at fault for the delay, the right to apply for an order for contempt is only two months old, as opposed to running from the dates of the awards themselves. Also, whether Mr. McMillan's delay amounts to contempt of court has to be viewed with the recognition that during all of the time the contempt clock has been running, that is from May 29, 2015, Mr. McMillan has made it known to the Court that he is seeking a stay of the obligations upon which to the contempt application is based. From those facts, I infer that if Mr. McMillan has been contemptuous, it has been more as against Ms. McMillan than the Court. It is true that he has not paid the balance owing under the Court order since May 29, 2015, but since then the delay has arisen simply from trying to schedule the two stay applications.

- [5] Mr. McMillan relies upon *Skybound Dev. Ltd. v. Hughes Properties Ltd.* (1988), 24 B.C.L.R. (2d) 1 (C.A.), in which all three members of the division hearing the appeal gave reasons. Taggart J.A. said this at paragraph 38:

Being of the view that the order is, to say the least, imprecise as to the time when the payment over should be made, and being of the view that R. 41(16) requires precision, I think the application for an order for contempt against Mr. Berge and his firm was founded on a wholly inadequate basis. There was no basis upon which the order for contempt made by Madam Justice Proudfoot could rest. It seems to me, in the circumstances which I have outlined, that one appropriate course that counsel for the defendants might have taken would have been to proceed under the rules to levy execution and thus perfect the order in an orderly fashion. Another course that could well have been proceeded with by either party would have been to apply in the appeals which had been launched from the orders of Mr. Justice Callaghan for directions as to what was to be done with the money then in the hands of the solicitors for the plaintiff. Rather than pursue some reasonable and rational course of action, very heavy artillery was set in motion and the contempt proceedings resulted.

- [6] The essence of Taggart J.A.'s reasoning was that the non-payment of an order for the payment of money cannot ordinarily form the basis of a contempt finding if the order did not specify the time for the payment. In concurring reasons, Esson J.A. expressly agreed entirely with Taggart J.A., but acknowledged there may be circumstances in other cases where default of an order requiring payment might give rise to a contempt finding, even though the order did not stipulate a date for payment. However, McLachlin J.A., as she then was, did not qualify her support in that way when she concurred with Taggart J.A. At paragraph 50 of the reasons, she said this:

I agree that the appeal should be allowed on the ground that the order, because it did not require payment by a specified date, was not shown to have been violated.

- [7] In my view, the *Skybound* decision is enough to have me conclude that a finding of contempt would be unsafe and inappropriate on the facts before me.
- [8] Ms. McMillan relies on *Bruce v. Vaughan*, 2015 BCSC 378, in both the contempt and the stay applications. Insofar as contempt is concerned, I distinguish the facts there from those at bar by contrasting the several specific court orders which were flouted in *Bruce*, as seen in paragraph 21 of that decision, with the May 29, 2015 order at bar, which does not stipulate a payment date.
- [9] In the result, the contempt application is dismissed. I wish to add only this: In recent years, contempt applications have become relatively common. In earlier years, they were rare. I believe they are being resorted to prematurely in many cases, and this may have been one of them. They are being used as a first line of attack. They should be a last line of attack. This Court has formidable powers under the law of contempt. Those powers should not be accessed lightly. They risk becoming diminished if they are overused.

- [10] I turn now to Mr. McMillan's application for a stay of execution in order to avoid paying the balance owing under the awards until his appeal of those awards is decided by this Court.
- [11] The parties are in agreement that the three-part, so-called RJR-MacDonald, analysis should be employed such that Mr. McMillan needs to show a serious question to be tried, irreparable harm from not having the stay and that the balance of convenience is in his favour.
- [12] Ms. McMillan correctly concedes that Mr. McMillan meets the first test, which is sometimes expressed by saying that Mr. McMillan's arguments on appeal are not frivolous or vexatious. Given the common ground on that point, I will say no more about it.
- [13] Turning to irreparable harm, the strongest evidence Mr. McMillan presents is found in paragraphs 16-18 of his affidavit sworn July 27, 2015:
16. Re Paragraph 22: Aside from my 50% interest in the Crabapple House, all of my other assets are jointly owned with my wife, Ingrid Schmidtova-McMillan ("Ingrid"). Ingrid has obtained legal advice, and will not agree to further encumber our joint assets. Ingrid is 12 years younger than me. Ingrid and I plan to have our own children soon, and Ingrid is depending on our joint asset base for the future financial security of our family.
17. I do not have other assets that I can post as security or otherwise satisfy a lending institution. As a result of my 30 year relationship with CIBC and my excellent credit history with them, they have extended the offer of a line of credit secured by the Crabapple House, and are prepared to have me assume the mortgage, but the Claimant has to provide them with certain paperwork. The Claimant and I have different advisors at CIBC Private Banking, so I am not privy to what her discussions with them are relative to the Crabapple House mortgage.
18. Re second paragraph 25 page 6: The Claimant has no knowledge of my funds or resources or how I have structured my future financial security. I have not been employed since 2006. My only source of income is from Ingrid and my investments which have been structured to minimize tax and are extremely complicated. If Ingrid agreed to convert the investments to cash, which she has told me she will not agree to, it would be extremely prejudicial, as it would trigger significant tax consequences and unravel the financial structure that could not be reversed or replicated. The only asset that I own that can be quickly accessed without Ingrid's consent, and without irreparable financial harm is my interest in the Crabapple House.
- [14] In my view, that is not enough evidence to satisfy Mr. McMillan's obligation to establish irreparable harm. Mr. McMillan is rich. He needs to pay under \$700,000 to satisfy the two awards. The evidence he presents does not go further than demonstrating inconvenience from having to come up with that money now. Any restructuring of his affairs needed to accommodate the payment may cost money. If it does, and Mr. McMillan succeeds on his appeal, he can make a claim for such costs. Ms. McMillan can afford to pay such a claim if it

is successfully advanced.

- [15] Given my finding against irreparable harm, I do not intend to determine the balance of convenience. In Mr. McMillan's favour on the balance of convenience, Ms. McMillan does not need the money at present and the appeal date is imminent. In Ms. McMillan's favour, she has been unpaid for approximately eight months and the stay application was brought late. Mr. McMillan first spoke of the application in March of 2015 and did not proceed to file it until June.
- [16] Ms. McMillan has volunteered to hold any payment she receives from Mr. McMillan in a guaranteed investment certificate pending the outcome of the appeal, and I hereby order her to do that.
- [17] In summary, the contempt application is dismissed and the stay application is dismissed. There will be no costs order. I thank counsel for their helpful submissions.

"MACINTOSH J."

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