

CANADA / JUDGMENT

Mori v. Lobb

2020 BCSC 1764

COURT

Supreme Court of British Columbia

DECIDED

19 October 2020

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2020 BCSC 1764 Mori v. Lobb

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mori v. Lobb,

2020 BCSC 1764

Date: 20201019

Docket: E192202

Registry: Vancouver

Between:

Elisabete Maria Mori

Claimant

And

Richard Kelly Lobb

Respondent

And

David Mori, Brandi Mori,

and Cara Maria Simone Dyck

Respondents by Counterclaim

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

October 13-15, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 19, 2020

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INTRODUCTION

- [1] There were three applications before me in this family law matter, seeking a wide variety of relief:
- a) the claimant's application dated September 17, 2020;
 - b) the respondent's application dated March 7, 2019; and
 - c) the respondent's application dated August 20, 2020.
- [2] There are other outstanding applications filed by the claimant, but her counsel advised that all the relief being sought is subsumed within her September 17, 2020 application. Similarly, any other outstanding applications by the respondent were not before me.
- [3] The parties eventually arrived at a series of consent orders on the appropriate management of the core issues relating to the potential addition of new parties and the retainer of a joint expert to prepare a business valuation. As such, I will not provide a comprehensive review of the facts and history of this complex and high-conflict matter, but rather, will only outline those facts necessary to address the residual issues on which the parties could not agree.

ANALYSIS

Burnaby Condo

- [4] The residual issue remaining from the claimant's application is a request that she be given certain rights to communicate with, and provide direction to, the Strata Corporation governing #2903 - 2088 Madison Ave., Burnaby, BC (the "Burnaby Condo"), in which she resides, but for which the respondent holds title.
- [5] I accept that there have been communication problems that need to be addressed if the parties are going to continue to operate under the present residential arrangement, but the claimant's proposed form of order provides rights inconsistent with the fact that the respondent holds title. In my view, the following three orders are better suited to addressing the communication challenges and ensuring full transparency:
1. The parties will exchange information through counsel as to any concerns either party has in relation to the Burnaby Condo or its Strata Council, including with respect to fees, fines, expenses or interferences with quiet enjoyment.
 2. The respondent will provide claimant's counsel with any communication from the Strata Council necessary for the claimant to control or reduce fees, fines, expenses and interferences with her quiet enjoyment.
 3. The respondent will provide the Strata Council with any communication from the claimant's counsel necessary to control or reduce fees, fines, expenses or interferences with quiet enjoyment.

- [6] The respondent also sought a variety of orders regarding the Burnaby Condo, including:
- (a) that the order of Justice Russell dated September 12, 2020 (the "Russell Order") be varied to provide that the claimant is responsible for paying all expenses related to the Burnaby Condo as of March 23, 2020, including property taxes, water, utilities, monthly maintenance fees, heat, electricity and Internet;
 - (b) that the claimant reimburse \$2,531.19 to the respondent forthwith, representing BC Hydro costs said to be over and above the amount ordered to be paid by the respondent pursuant to the Russell Order; and further that the claimant pay directly all future utility charges by opening an account in her name, after which the respondent is at liberty to terminate the account in his name with BC Hydro;
 - (c) that the claimant be responsible for preserving the Burnaby Condo by immediately paying to the Strata Corporation fines and costs in the amount of \$2,900, as of August 1, 2020, and the continuing contravention charge of \$200 per week levied by the Strata Corporation for the Burnaby Condo; and
 - (d) that the Burnaby Condo be immediately listed for sale and sold, with conduct of sale to the respondent and the proceeds of sale to be held in the trust account of Judith A. Janzen Law Corporation pending further Order of this Honourable Court or agreement between the parties.
- [7] There is a complication regarding the Burnaby Condo and its expenses. Both parties acknowledge that the claimant has been allowed to remain in the Burnaby Condo expense-free, and that this can be viewed very generally as a proxy for spousal support or, at a minimum, as a benefit to be accounted for if and when the plaintiff's intended application for spousal support is heard. To reflect this, the claimant was prepared to agree not to bring a spousal support application before trial, if the status quo in relation to the Burnaby Condo were maintained.
- [8] The applications to amend the Russell Order are governed by s. 217 of the Family Law Act, S.B.C. 2011, c. 25, which provides as follows:
- [217] If an application is made to change, suspend or terminate an order, an interim order for the relief applied for may be made only if the court is satisfied that
- (a) a change in circumstances has occurred since the order that is the subject of the application was made, and
 - (b) the hardship to a party of denying interim relief before the application is heard outweighs the hardship to any party of granting interim relief.
- [9] I am not satisfied that this test has been met on the facts before me. Although the case has had trial adjournments, we are not so far beyond the date of the Russell Order that continuing to hold a party to the terms of the order is unfair for that reason alone.

- [10] Further, the underlying factual situation has not changed dramatically since the order was issued. In particular, although the respondent is retired, he was already retired at the time of the Russell Order.
- [11] Although there was a flare-up in the electrical expenses at the Burnaby Condo, I do not have sufficient information to find that either party was necessarily at fault for this increase such that an amendment of the Russell Order is justified. It appears to have been triggered by a malfunctioning fireplace, causing the Burnaby Condo to be more reliant on electricity rather than heat from the fireplace for which its gas costs are embedded in the strata fees. There was some evidence that the respondent was involved in repairs to the fireplace just before he left the Burnaby Condo. It is possible that this work was the cause of the failure. On the other hand, I do not have evidence that the claimant intentionally refrained from fixing the fireplace to run up the respondent's expenses. Indeed, it is not clear to me that either party knew what was causing the increased electrical bills. Furthermore, the fireplace has now been fixed, which will presumably end the temporary flare-up in expenses.
- [12] Finally, any expenses that the respondent has incurred in relation to the Burnaby Condo will necessarily be part of any final accounting that takes place at trial.
- [13] In terms of whether it makes sense to sell the Burnaby Condo at this time, I begin by noting two things:
- (a) as part of the consent orders, the parties agreed to make best efforts to secure a trial date as soon as possible after June 1, 2021; and
 - (b) the respondent indicated an intention to drop the claimant's children from the litigation, which should facilitate trial scheduling by reducing the number of counsel by at least one quarter.
- [14] This reasonably short projected time frame to trial encourages maintenance of the status quo. Any doubt as to the appropriateness of selling a family property before trial should be resolved in favour of the status quo: *A.B. v. C.D.*, 2015 BCSC 2134 at para. 64.
- [15] I have the following comments with respect to the other factors generally considered on an application for an interim order for sale, including those laid out in *A.B. v. C.D.* at para. 63:
- (a) I cannot conclude that a sale is necessary. The respondent has about \$1.8 million in RRSP funds and an income of about \$74,000 per year. Although it would not be tax efficient to cash in the RRSPs, it could be done. It cannot be said that the respondent needs the sale to avoid an uncomfortable living situation. He is presently living in a penthouse apartment in Yaletown owned by one of his sons.
 - (b) I cannot conclude that a sale would necessarily promote settlement. The real driver on settlement will be the receipt of the new business valuation report.

- (c) Although it appears likely that a sale will eventually be required, there are enough moving pieces that I cannot say that a sale is "inevitable".
 - (d) There does not appear to be a gross disparity in the quality of the parties' present living situations. Both are in penthouse apartments. Although the claimant's is larger, the respondent's is in Yaletown, a more prestigious area.
 - (e) There is no obvious immediate alternate accommodation available for the claimant in the Lower Mainland, as her local adult daughter is living with her. That said, I accept that one of the reasons for this situation is that the claimant has assisted the daughter in buying an apartment, which is presently being rented out. However, there was no available evidence about the term of this lease.
- [16] Because of the above, I cannot conclude that it is necessary or expedient to sell the Burnaby Condo at this time. However, I confirm that the respondent has leave to bring the applications regarding the Burnaby Condo sale and related orders back for hearing should the claimant change her position and seek spousal support before trial. In the context of such a spousal support application, it will be necessary to carefully consider whether the extant orders regarding the Burnaby Condo should also be adjusted, as there is clearly an arguable case that allowing the claimant to receive the benefit of both the Burnaby Condo and spousal support would amount to the claimant "having her cake and eating it too".
- [17] Based on similar factors, I do not find it appropriate to make any of the other orders requested to adjust or correct the financial arrangements regarding the Burnaby Condo with one exception, discussed below. I note again that any expenses incurred by the respondent will presumably need to be considered as part of the final accounting at trial.
- [18] There is one order that I am prepared to make regarding the Burnaby Condo at this time, which the claimant was prepared to accept. This related to the application in relation to outstanding fines. The claimant was prepared to pay the outstanding fines so long as she was given 30 days to attempt to negotiate their reduction or removal. She also sought to reserve the right to argue that some of the fines were incurred for issues arising prior to the respondent departing the home. The limited evidence available suggests the outstanding fines were primarily incurred after the respondent's departure. As such, I make an order that any fines remaining 30 days from today's judgment be paid by the claimant, while reserving the claimant's right to argue at trial that any fines are properly the responsibility of the respondent.

Mexico Condo

- [19] The respondent seeks to vary paragraph 9 of the Russell Order to provide, in summary terms, that the claimant be responsible for paying half of the expenses related to the parties' jointly-owned property located at 3818, Level 7, Velas Vallarta, Lot H-2, Puerto Vallarta, Jalisco, Mexico (the "Mexico Condo"). For many of the same reasons expressed above in relation to the Burnaby Condo, I find that it is more appropriate to retain the status quo for

this property as well, subject to the same reservation that the respondent is at liberty to bring this application back for hearing should the claimant seek a spousal support order before trial.

Business Valuation and Associated Expenses

- [20] The respondent sought certain orders regarding the business valuation provisions of the Russell Order, and the expenses incurred in relation to same, specifically that:
- (a) the business valuations dated November 25, 2019, prepared by the Spence Valuation Group ("Spence") for Lobb Holdings Ltd. ("Lobb") and Hytec Water Management Ltd. ("Hytec"), stand as the joint expert report required by the Russell Order;
 - (b) the claimant reimburses the respondent 40 percent of the costs of \$16,025 that he has paid to Spence, for an amount payable by the claimant to the respondent of \$6,410; and
 - (c) the claimant reimburses the respondent 40 percent of the costs of \$9,287.25 that he has paid to Lobb and Hytec's accountant, MNP, for an amount payable by the claimant to the respondent of \$3,714.90.
- [21] The first of these requested orders has been dealt with by the consent orders, which already have a further report being prepared by a different valuator.
- [22] As to the second request regarding the Spence expense, I find that both parties bear some responsibility for the breakdown in the relationship established with the first proposed valuator, Patti Daum. This relationship breakdown caused the respondent to seek out alternative help from Spence, in order to ensure that some information was available to the court for an earlier pending trial date. Claimant's prior counsel should not have corresponded directly with Ms. Daum seeking to direct her method of calculation without first addressing the issue with respondent's counsel. However, once that problem occurred, respondent's counsel should have sought direction from the court as to whether Ms. Daum's appointment should continue, or whether a new joint expert should be retained, rather than the respondent engaging in self-help by retaining his own expert from Spence.
- [23] I find that the most equitable outcome in these circumstances is to allow the respondent to withdraw one half of the cost of the Spence report from the \$100,000 presently held in trust by the respondent's firm, or \$8,012.50.
- [24] The third requested order deals with the expense incurred by MNP in preparing information regarding the subject corporations. Given both parties' limited liquid assets, rather than requiring the claimant to come up with new funds out of pocket, I find that a more equitable solution is for the \$9,287.25 to be paid from the amount presently held in trust by the respondent's firm.

Restraining Order

- [25] The respondent sought an order that the claimant is prohibited from contacting the respondent in any manner, except for the purposes of mediation and in the presence of counsel.
- [26] I agree with claimant's counsel; given that the record is rife with allegations of inappropriate and even violent conduct by both parties, a more appropriate order is a two-way conduct order under s. 222(b). Specifically, an order that:

Neither party shall have contact with the other, except through their respective counsel.

Release of Amount in Trust

- [27] The respondent sought an order vacating paragraph 11 of the Russell Order which required the respondent to place the sum of \$100,000 in the trust account of Judith A. Janzen Law Corporation and permitting use of this \$100,000 for payment of the respondent's legal fees.
- [28] I have already allowed the withdrawal of certain amounts from this trust account for the preparation of a business valuation report. I find that this is a sufficient loosening of the bonds on this fund to ensure fairness at present. However, given that both parties are alleging some financial pressure preventing the payment of past and future legal fees, I confirm that the parties are at liberty to come to their own agreement allowing withdrawal of additional amounts from the residual trust account without the necessity of a further court application.

Residual Issues

- [29] Item 9 of the respondent's application, filed August 20, 2020, has been rendered moot as a result of the consent orders agreed to by the parties. Item 10 was withdrawn. Items 11 through 13 of the respondent's application, filed August 20, 2020, were adjourned generally, as was Item 2 of the respondent's application filed March 7, 2019.
- [30] I am prepared to seize myself of all further pre-trial applications in this matter, save that, if a moving party is unable to fix a date with me within four weeks of making their request, they have leave to set the matter down in regular chambers.
- [31] In terms of costs, given the most controversial issues were resolved by way of consent order and the results of the residual matters were mixed, I would order that the claimant and the respondent bear their own costs of the applications before me, unless either party seeks to make more formal submissions on costs. The question of costs in relation to the proposed new parties is put over for later consideration, pursuant to discussions that occurred during the course of the hearing.

"Branch J."

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