

CANADA / JUDGMENT

# Nygaard v. Nygaard

2014 BCSC 2382

## COURT

Supreme Court of British Columbia

## DECIDED

16 December 2014

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2014 BCSC 2382 Nygaard v. Nygaard IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Nygaard v. Nygaard, 2014 BCSC 2382 Date: 20141216 Docket: 12070 Registry: Kamloops Between: Brenda Lorraine Nygaard Claimant And Dale Bobby Nygaard Respondent Before: The Honourable Madam Justice Hyslop Reasons for Judgment Counsel for the Petitioner: M.S. Harrison Counsel for the Respondent: K.P. Jensen Place and Date of Hearing: Kamloops, B.C. December 3, 2014 Place and Date of Judgment: Kamloops, B.C. December 16, 2014

## INTRODUCTION

- [1] This is an application to enforce an order pursuant to Rule 15-4 (8) of Supreme Court Family Rules, B.C. Reg. 169/2009, [Family Rules] brought by Dale Bobby Nygaard, the respondent.
- [2] Mr. Nygaard's claim is as follows:
1. The Claimant, BRENDA LORRAINE NYGAARD also known as BRENDA LORRAINE NORFOLK, provide to the Respondent, DALE BOBBY NYGAARD, an accounting of the funds received from the sale of the following: PID: 009-692-452 The West 10 Chains of the South East  $\frac{1}{4}$  of Section 26, Township 6, Range 3, Coast District: and PID: 009-671-331 That Part of the NW  $\frac{1}{4}$  [of the NE  $\frac{1}{4}$ ] and Section 23, Township 6, Range 3, Coast District (the "Matrimonial Properties")
  2. Judgment against the Claimant, BRENDA LORRAINE NYGAARD also known as BRENDA LORRAINE NORFOLK, which Judgment shall form a lien against the lands and premises located at 6045 Skaday Road, more particularly known and described as: PID: 005-712-823 Lot 4, Plan 11360, District Lot 3869, Lillooet Land District (the "Lands and Premises")
  3. The Claimant, BRENDA LORRAINE NYGAARD also known as BRENDA LORRAINE NORFOLK, be restrained from selling or renegotiating, or in any way reducing her equity in the Lands and Premises, or in the alternative, the Respondent, DALE BOBBY NYGAARD, be entitled to file a Certificate of Pending Litigation on the aforesaid Lands and Premises claiming an interest in the aforesaid Lands and Premises.
  4. Interest.

5. Costs or special costs.
- [3] It is opposed by the claimant.
- [4] The respondent's claim is based on an order granted August 4, 1999 by Mr. Justice Preston (the "Order"). Save for the divorce, the Order was by consent. The Order relates to the division of the claimant and respondent's property upon divorce: AND BY CONSENT: THIS COURT FURTHER ORDERS that the farm and waterfront property located at McKenzie Highway, Firvale, British Columbia, more particularly known and described as: Parcel Identifier: 009-692-452 The West 10 Chains of the South East ¼ of Section 26, Township 6, Range 3, coast District: and PID: 009-671-331 That Part of the NW ¼ of the NE ¼ and Section 23, Township 6, Range 3, Coast District, shall be listed for sale and sold, with the parties to share joint conduct of sale and with liberty to either party to apply should they be unable to agree on any of the terms of sale; THIS COURT FURTHER ORDERS that the proceeds of sale of the above properties, after payment of real estate commission and usual adjustments, shall be divided into two equal shares, and shall be dealt with as follows:
- (a) Any outstanding property taxes and/or arrears under the mortgage shall be taken from the defendant's share;
  - (b) The balance of the mortgage, including any pre-payment penalties shall be deducted equally from the shares of both parties;
  - (c) From the defendant's share, there shall be deducted and paid to the plaintiff:
    - (i) \$9,000.00 on account of the equalization of family debts; (ii) \$5,050 on account of the equalization of family assets; and (iii) \$1,900.00 on account of costs; POSITION OF PARTIES
- [5] The claimant argues that since the Order was granted, she and the respondent agreed that despite the Order, she would purchase the respondent's interest in the real property. This real property, consisting of two legal descriptions, is referred to in these reasons as "452 and 331". The claimant swears that she paid the respondent "at least \$23,000.00" for the respondent's interest in 452 and 331. Further, the claimant argues that the respondent's claim is too late and is barred by the Limitation Act, S.B.C. 2012 c. 13 [LA]. In the alternative, the claimant raises the equitable defence of laches.
- [6] The respondent's position is that there was no such agreement. He alleges that the sale of 452 and 331 took place in 2005 and that the claimant must account to him as to the sale proceeds and pay him the amount due under the Order.
- [7] He argues that as of the date of the sale, his claim under the LA is not barred. The respondent states that in 2000, he transferred the title of 452 and 331 to the claimant "in order to facilitate the sale and disposition of the proceeds of the sale of the properties as set out in the Order."

## FACTS

- [8] The facts that I am about to recite are not in dispute.
- [9] The respondent is age 67. His income is that of pensions. The claimant is 66; she continues to be employed. She owns a home on which there is a mortgage. She has some difficulty in making ends meet.
- [10] The claimant and the respondent were married December 2, 1967. They separated in 1997. They have three children, all of whom are adults. One of those children, Tracy Nygaard, age 45, has sworn an affidavit with respect to these proceedings.
- [11] At the time of their separation, they owned 452 and 331, located adjacent to each other. The property was bare land when it was purchased by the parties in 1980 and 1996. During the time that they were together, they built a home and other buildings. The home which is located on 452, consists of 52 acres and at the time of their separation, they resided in it together.
- [12] On June 21, 1996, the parties mortgaged 452 to the Bella Coola Valley Credit Union (the "Credit Union") for \$45,000.00 with interest at the rate of 9.7% per annum which required monthly payments of \$588.47.
- [13] In dispute is how complete the home was on the date of the parties' separation.
- [14] When the parties separated the respondent remained in the home for about two years. During this time, the parties offered 452 and 331 for sale, but not through a real estate agent. Access to the property was by a private road, some of which was located on the neighbour's property. The neighbour refused to give the parties an easement for the road.
- [15] The claimant resided in the home located at 452 from approximately 2000 until 2003 or 2004. It was vacant for about two years until it was sold by the claimant to Nathaniel Winkler Grosman on June 22, 2005. In 2009, Mr. Grosman sold 452 and 331 to Mr. and Mrs. Sayers. In 2009, an error was discovered. The error was that at the time of the sale to Mr. Grosman, title to 452 had not been transferred. As a result, the claimant transferred to the Sayers title to 452 for consideration of \$1.00.
- [16] While the respondent lived on the property, the claimant made "many" of the mortgage payments registered against 452 in favour of the Credit Union. I conclude that this is accurate, as the respondent did not seriously dispute it and also in the Order it stated that from the proceeds, of the respondent's (then the defendant), one-half share "Any outstanding property taxes and/or arrears under the mortgage shall be taken from the defendant's share".
- [17] In or about December of 2013, the claimant swears that the respondent "attended at my home and told me that he had a lawyer that would get everything out of me and that I owed him money". The claimant received a letter dated June 10, 2014 from the respondent's lawyers stating: RE: Nygaard v. Nygaard\_\_\_\_\_ Please be advised that I represent your

ex-husband, Dale Nygaard. He has retained me in regards to the Divorce Order obtained before Justice Preston on the 4th of August, 1999. That Order provides that a certain property be sold and that you and my client are to share joint conduct of sale. My client has advised me that he transferred the property to you on the trust condition that you comply with this Order and that you have paid to him \$23,000.00. From my research, there does not appear to be any compliance to the terms of the Order. I have instructions to start a legal action against you if necessary. Accordingly, upon receipt of this letter, I would ask that you deliver it to your lawyer in order that I can enter into settlement discussions. Failure to resolve this matter in a timely way will result in my client taking legal action against you.

[18] There is no dispute that the respondent transferred to the claimant title of 452 and 331 on April 27, 2000.

[19] The claimant states in her affidavit:

23. I have been searching for documentation in this matter in order to provide support for the statements in this affidavit and have contacted the lawyers involved and the credit union. I have not been able to obtain any documentation as files have long been closed. I do not have any documentation in my possession as I had what can only be described as a divorce celebration, and got rid of my paperwork relating to my separation from the respondent; bearing in mind that we separated 17 years ago and I paid out the respondent 14 years ago. The claimant uses the word "closed". I think that she meant that the files are destroyed or no longer exist. No one has suggested that records and documents are available to support either party's claim. The claimant swears that agreement between her and the respondent was verbal. THIS ACTION BEFORE THE COURT

[20] There are conflicting affidavits before the court. The conflicts revolve, on whether the \$23,000.00 paid by the claimant to the respondent was for the purchase by the claimant's interest in 452 and 331, the state of the completion of the family home, what the claimant did to complete the home, and why no steps were taken by the respondent to pursue his claim under the Order.

[21] These factual disputes are significant and go to the heart of the claim. Despite this, both parties wish to have this dispute resolved summarily and not decided after a full trial. Counsel for the respondent stated the need for rough justice and that proportionality must be considered as set out in Rule 1-3(2) of the Family Rules. Counsel for the claimant stated and agreed with counsel for the respondent that the affidavits are the best evidence available and a trial will not reveal more.

[22] Based on the evidence before me, cross-examination of the affidavits may have helped the court with findings of credibility. Neither party sought to cross-examine the other on their affidavits. DISCUSSION

[23] After the separation, the claimant and respondent attempted to sell their property. It did not sell.

- [24] I accept the claimant's evidence that after the granting of the Order, she and the respondent had a discussion about 452 and 331. I find that the respondent wanted to move as he had no work in Bella Coola and that he did move and the claimant was employed. As a result, they discussed the claimant buying out the respondent's interest in the property. I find that an agreement was struck and that the claimant would buy the respondent's interest in 452 and 331. The Form A transfers were signed by the claimant on April 27, 2000 and by the respondent on May 3, 2000, transferring the property to the claimant. At the time of the transfer, the claimant paid the respondent \$2,000.00 and then a few months later, paid the respondent \$21,000.00. I find that the timing of the transfer supports the evidence of the claimant as does the respondent's evidence as to when he received the payments totalling \$23,000.00.
- [25] The claimant swears that as a result of purchasing the respondent's interest in the property, she obtained a mortgage, the proceeds of which were used to consolidate her debts and pay the respondent.
- [26] The claimant's evidence is that the home was unfinished. The respondent claims that the claimant is wrong as to its state of finish and completion.
- [27] The respondent filed a number of affidavits from friends and a relative commenting on their recollection of the state of the finish of the home. Summarizing this evidence is "minor things", and that they were "still working on it". In the affidavit of Dr. Harvey Thommasen, he states: I would describe the house as a work in progress. Some parts were very beautiful and some parts needed work. I believe that in terms of plastic on windows, no gyproc and so on, that's all a matter of degree and I don't think it is as significant as set out in the Claimant's Affidavit. The best evidence is that which comes from the parties' daughter, Tracy, who visited her father in the house in July of 1997. She swears:
6. The family home was in an unfinished condition. There was plastic, and not glass, on some of the windows (I recall the living room in particular not having actual windows), the flooring was partially complete, the kitchen was unfinished, there were walls with bare insulation because the drywall was not complete, the exterior of the home was not completely sided, new fences were needed to keep livestock inside the property, the water supply from the well was unsuitable to drink due to a high iron content. It stained the sinks, toilet, tubs and clothing washed in the washing machine.
  7. The driveway to the family home ran across the neighbor's property. She wanted the driveway access off her property and I was present during a conversation between my mother and this neighbor when she expressed angrily that my father would not grant this request.
  11. The family home had significant improvements. A new driveway had been put in on the family home property, new improved fencing for livestock had been put up on the neighbor, the Hans Kovacic/family home, property line. Repairs had been made to the woodshed and shop, and a new barn and hay/equipment storage were built. The house inside had windows

installed, the walls were newly painted and the siding was completed on the exterior of the home. A water filtration system was installed to improve water quality. I understand from speaking with my mother, that after 2001, she had a new well put in on the property.

- [28] I conclude that the home was not finished and that the claimant spent the money and time to finish the home and eventually sell it.
- [29] I do not accept the respondent's evidence that he transferred his interest to the claimant in 452 and 331 in order to facilitate its sale. There was no sale in sight or any active interest for its purchase. Had this been the situation, there is no reason for the claimant to borrow money and pay the respondent \$23,000.00. The respondent provides no explanation as to why he accepted \$23,000.00 from the claimant.
- [30] When and after the property was sold in 2005, the respondent made no inquiries of the claimant or anyone else seeking information as to the disposition of 452 and 331. It was not until December of 2013 when the respondent told the claimant he was asserting a claim to 452 and 331. Despite his right under the Order, the defendant did not assert his right to joint conduct of the sale of the property.
- [31] The respondent's evidence confirms that he knew that the claimant had left the family home when he swore:
5. I then moved to the Sorrento area and I believe the Claimant and her boyfriend returned to the Matrimonial Properties and later moved to 100 Mile House from the Matrimonial Properties in approximately 2005.
- [32] Based on her belief that she had purchased the respondent's interest in 452 and 331, the claimant completed the home making it saleable. In doing so, she took on debt and, when she sold it, she used the property proceeds to buy a home with her common-law husband and then sell it and then buy another one in her own name. I conclude that she would not have done this had there not been a buyout of the respondent's interest. She simply would not have prejudiced herself to such an extent that, 14 years later, the respondent would come along and seek an accounting and payment pursuant to the Order.
- [33] The respondent seeks \$31,000.00, plus interest. He values 452 and 331 at \$188,000.00, takes off the amount of the parties' mortgage of \$45,000.00, divided the amount in half and credits the claimant with \$23,000.00. This amount does not take into consideration the mortgage the plaintiff took out and the costs to complete the house.
- [34] The respondent has attempted to determine the value of the property based on financial statements and affidavits sworn and filed by the parties before the Order was granted. Most of the evidence in the affidavits is inadmissible now and it was inadmissible when it was sworn. Nor is it helpful to attempt to figure out how the amount of \$23,000.00 was calculated by using the consideration stated in the Form A transfers in 2000 and the assessment values in 2000. Whether the parties attempted to base the \$23,000.00 on the particulars of the Order is unknown.

- [35] Between 2000 and 2005 the respondent did not contribute financially to the property or make any effort towards its sale - why would he? He had no further interest in 452 and 331.
- [36] I conclude that in April of 2000, the claimant bought the respondent's interest in the property known as 452 and 331. Neither party, and in particular, the respondent, intended on pursuing his claims under the Order. I dismiss the respondent's application. THE LIMITATION ACT
- [37] Having found that there was an agreement between the claimant and the respondent, it is not necessary to address the limitation defence or laches. However, I will address the limitation defence.
- [38] The claimant argues that the respondent's claim pursuant to the Order is barred by the LA. The claimant states that the dates when the respondent's claim starts is one of the years 1999, 2000, or 2005. The claimant argues that the date should be 2000. I disagree. The date when the respondent was entitled to receive the sale proceeds of 452 and 331 subject to the stated adjustments to the respective share of each party is on the sale of 452 and 331. That date is 2005, when the claimant sold 452 and 331 to Mr. Grosman. That is when the respondent was entitled to the sale proceeds coming to him and a judgment as well as an accounting of the sale proceeds.
- [39] The question in assessing whether the respondent's claim is barred is whether it is under the old Limitation Act, R.S.B.C. 1996 c. 266, or the new LA, which came into effect on June 1, 2013.
- [40] The claimant is enforcing a local judgment. There is no change in the old act to the new act as to the definition of judgment or local judgment: "judgment" means an extraprovincial judgment or a local judgment; "local judgment" means any of the following:
- (a) a judgment, order or award of
  - (i) the Supreme Court of Canada relating to an appeal from a British Columbia court, (ii) the British Columbia Court of Appeal, (iii) the Supreme Court of British Columbia, (iv) the Provincial Court of British Columbia, or
  - (v) an arbitration to which the Arbitration Act applies;
  - (b) an arbitral award to which the Foreign Arbitral Awards Act or the International Commercial Arbitration Act applies; Basic limitation period for court proceeding to enforce or sue on judgment 7 Subject to this Act, a court proceeding must not be commenced to enforce or sue on a judgment for the payment of money or the return of personal property,
  - (a) if the judgment is a local judgment, more than 10 years after the day on which the judgment becomes enforceable,

- [41] In the LA, the transition from the former act to the new act is as follows: Transition 30 (1) In this section: "effective date" means the day on which this section comes into force; "former Act" means the Limitation Act, R.S.B.C. 1996, c. 266, as that Act read immediately before the effective date; "former limitation period" means, with respect to a pre-existing claim, a limitation period that applied to the pre-existing claim before the effective date; "pre-existing claim" means a claim
- (a) that is based on an act or omission that took place before the effective date, and
  - (b) with respect to which no court proceeding has been commenced before the effective date.
- (2) A court proceeding must not be commenced with respect to a pre-existing claim if
- (a) a former limitation period applied to that claim before the effective date, and
  - (b) that former limitation period expired before the effective date.
- (3) Subject to subsection (2), if a pre-existing claim was discovered before the effective date, the former Act applies to the pre-existing claim as if the right to bring an action occurred at the time of the discovery of the pre-existing claim.
- [42] The claimant argues that the new act applies. I agree.
- [43] I find that the limitation period under the LA has not expired. COSTS
- [44] The claimant shall have her costs and reasonable disbursements at Appendix B, Scale B of the Family Rules. "H.C. Hyslop J." HYSLOP J.

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