

CANADA / JUDGMENT

Partington v. Brown

2020 BCSC 2075

COURT

Supreme Court of British Columbia

DECIDED

29 December 2020

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2020 BCSC 2075 Partington v. Brown

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Partington v. Brown,

2020 BCSC 2075

Date: 20201229

Docket: E55779

Registry: New Westminster

Between:

Ashley Sabine Partington

Claimant

And

Shane Patrick Brown

Respondent

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Claimant:

B.D. McCarthy

Counsel for the Respondent:

L. Rudovica

Place and Date of Hearing:

New Westminster, B.C.

December 11, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 29, 2020

I. Introduction

- [1] The claimant, Ms. Partington, applies pursuant to Rule 2-1(3) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR] for an order enforcing an agreement filed with the court pursuant to Rule 2-1.
- [2] Specifically, Ms. Partington contends that the respondent, Mr. Brown, has refused to comply with a term of their settlement agreement requiring him to transfer \$75,000 to Ms. Partington by way of an RRSP rollover.
- [3] Mr. Brown applies for an order enforcing an alleged oral agreement that is contrary to the written agreement filed with the court. In the alternative, he contends that there is a triable issue regarding enforceability of the RRSP rollover provision of the settlement agreement, and therefore I should order a trial of the issues.

II. Background

- [4] The parties lived together in a common-law relationship from September 2004 to July 2018. They resided together in a home in Langley which was owned solely by Mr. Brown. When they separated July 13, 2018, the claimant moved out of the Langley home and resided temporarily with her sister.
- [5] The Langley home had very recently been sold when the parties separated. Mr. Brown was in receipt of the net sale proceeds in the amount of \$663,392.
- [6] The claimant filed a notice of family claim, seeking a division of assets and spousal support.
- [7] The parties attended a mediation with Peter Leask, Q.C. on March 14, 2019. Both had counsel. They entered into a settlement agreement, described as "minutes of settlement" (the "settlement" or the "settlement agreement"), which was signed on that day by the parties and their legal counsel.
- [8] The settlement agreement was very simple. The material financial terms are as follows:
 - 1) Mr. Brown shall make a payment of \$400,000 to Ms. Partington by March 18, 2019 at 4 p.m. which is a global lump sum settlement of Ms. Partington's claims for division of assets and spousal support.

- 2) Ms. Partington shall further retain the yellow Bronco and Nissan Versa 2009.
- 3) There will be a RRSP roll over into Ms. Partington's name in the amount of \$75,000.
- 4) Mr. Brown shall retain the remainder of the family assets and family debt.
- [9] Mr. Brown paid the \$400,000 as required, and transferred the vehicles to Ms. Partington, but refused to execute the RRSP rollover.
- [10] Mr. Brown asserts that during a break in the mediation the parties had a private discussion, during which he agreed to increase the cash payment from \$375,000 to \$400,000, and the claimant agreed that she would not "go after" his RRSPs. He further alleges that when the claimant attended at his home a few days after the mediation, on March 20, 2019, she confirmed that she would not insist on the RRSP rollover. Ms. Partington denies any such agreement. This is the agreement he contends ought to be enforced by the court.
- [11] Mr. Brown's application to enforce the oral agreement is unsupported by any pleading. It is really just an answer to Ms. Partington's application.

III. Analysis

- [12] An agreement filed with the court pursuant to Rule 2-1(1) may be enforced pursuant to Rule 2-1(3), by an application pursuant to Part 10 of the SCFR.
- [13] The minutes of settlement is an agreement under s. 163(3) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], as referred to in Rule 2-1(1) of the SCFR, because in addition to property, it deals with spousal support: *Li v. Zhu*, 2018 BCSC 2182.
- [14] SCFR 10-11(1) provides:

Final orders in defended family law cases

- (1) To obtain a final order, other than at trial, in a defended family law case begun by the filing of a notice of family claim, a party must apply by way of summary trial in accordance with Rule 11-3.
- [15] I accept the applicant's contention that an order enforcing such an agreement is not a "final order in a defended family law case begun by the filing of a notice of family claim " within the meaning of Rule 10-11(1). Therefore, a written agreement under the FLA may be enforced pursuant to Rule 2-1(3), without the necessity of a trial or summary trial.
- [16] Neither party cited any authority governing the test to be applied in deciding whether the agreement may be summarily enforced pursuant to Rule 2-1(3) and Part 10 of the SCFR, or whether a trial should be ordered.
- [17] Rule 2-1(3) incorporates the procedures under Part 10, Rule 10-3 ("Chambers Proceedings"). Pursuant to Rule 10-3(7) the court may:

- (d) order a trial of the chambers proceeding, either generally or on an issue, and order a pleading to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.
- [18] Quite apart from Rule 2-1(3), the court has jurisdiction to summarily enforce settlement of an action by way of an application to court: *Thiessen v. 492907 B.C. Ltd. et al*, 2006 BCSC 373, at paras. 32-40 (citing, among other authorities, s. 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253, and *McKenzie v. McKenzie* (1975), 55 D.L.R. (3d) 373 (B.C.S.C.); *aff'd* 69 D.L.R. (3d) 765, (B.C.C.A.); *L.M.U. v. R.L.U.*, 2004 BCSC 95, at paras. 64-66, 82-83 [L.M.U.]; *Sandhu v. Hennessy*, 2020 BCSC 515 at paras. 30-39.
- [19] On such applications, the test generally applied is whether there is a material, triable issue: *L.M.U.*, at para. 64; *Roumanis v. Hill*, 2013 BCSC 1047, at para. 57; *Carlton v. Carlton*, 2017 BCSC 603 at para. 45.
- [20] I see no reason why the test for summary enforcement of the settlement agreement under SCFR Rule 2-1(3) should be any different. More specifically, the test should be the same as that generally applicable on chambers applications. If there is a bona fide (that is, real or genuine) triable issue, then the application should be dismissed, or referred to a trial. Put another way, if the application respondent is bound to lose, then there is no bona fide triable issue and the application should be granted: *C.M.R. v. L.F.R.*, 2019 BCCA 371, at para 16.
- [21] In my view there is no bona fide triable issue in this matter. Mr. Brown is bound to lose. Therefore, an order enforcing the settlement should be made.
- [22] The first practically insurmountable hurdle faced by Mr. Brown is that the oral agreement he asserts is directly contrary to and inconsistent with the settlement agreement, which could hardly be more clear.
- [23] At the hearing of the applications I raised the question of whether Mr. Brown's assertions would be admissible, or would be barred as being contrary to the parole evidence rule.
- [24] The parole evidence rule is explained in this way by G.H.L. Fridman, in *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 440:

The fundamental rule is that if the language of the written contract is clear and unambiguous, then no extrinsic parole evidence may be admitted to alter, vary, or interpret in any way the words used in the writing. Parole extrinsic evidence may not be admitted where the effect of such evidence would be to contradict the written contract. It is otherwise where the purpose and result of allowing such evidence to be given would be to explain or interpret the true intentions of the parties, where such are not clear from the document.

- [25] Footnote 37 adds the following:

This also applies to affidavit evidence: *Finning Tractor & Equipment Co. v. British Columbia (Ministry of Finance)* (1988), 30 B.C.L.R (2d) 249 (B.C.C.A.), where such evidence contradicted the express terms of the lease and standby agreement. The evidence would have substituted a new agreement, not explain the true nature of the existing agreement.

[26] There is no ambiguity about the terms of the settlement agreement. However, as the parties have not had an opportunity to address this issue, I will not rest my decision on it.

[27] Assuming, then, that Mr. Brown's evidence could be admitted, notwithstanding the parol evidence rule, in my view it is manifestly clear that his contention would fail. Indeed, his evidence borders on the preposterous.

[28] Mr. Brown's financial statement sworn September 6, 2018 listed RRSPs having a value of \$237,021. The settlement agreement records that he agreed to transfer \$75,000 to Ms. Partington; thus, about 32% of the total.

[29] Ms. Partington states that, at the mediation, she agreed to accept much less than one half of the RRSPs, because she did not claim a share of the savings that Mr. Brown brought into the relationship. She accepted \$75,000 even though no documents had been produced verifying the RRSP values when cohabitation began.

[30] Mr. Brown swears as follows:

when we attended at the mediation with Mr. Peter Leask, Q.C., Ashley and I were left in the room alone at the end of the day as we were a few thousand apart on the settlement. Ashley started to cry and told me she will never go after my RRSP's if only I agree to give her the cheque for \$400,000. I felt really bad and wanted us to amicably settle. I believed her when she told me that she would not enforce or require me to transfer any of my RRSP's.

[31] Therefore, the implication of Mr. Brown's evidence is that immediately after the oral agreement he alleges was made during the interval when the parties were alone, the parties together with their counsel executed the formal minutes of settlement that are exactly opposite to the oral agreement he alleges. To say this makes no sense is an understatement.

[32] The settlement agreement itself excludes the oral agreement Mr. Brown asserts. The recitals state:

Both parties accept, acknowledge and agree that this agreement is intended to constitute a binding settlement agreement.

[33] Paragraph 7 states:

The parties agree that these Minutes constitute full and final satisfaction in settlement of all issues between them and all right and obligations arising ou[t] of their relationship.

[34] Ms. Partington states that the first time she became aware of his contention that they made a secret side deal at the mediation is when she saw his affidavit sworn in response to her application. In her response affidavit she states:

We never discussed me not getting the \$75,000 in RRSPs. If we had, we would have just left it out of the agreement.

At mediation we were \$25,000 apart near the end of the day. We had already agreed on the \$75,000 RRSP transfer and me getting my car and the yellow Bronco. I was seeking \$400,000 for everything else and Shane wanted to agree to \$375,000. The mediator, Mr. Leask, suggested we talk for a few minutes without he and the lawyers because we were so close to finalizing matters.

I was crying and pleaded with Shane to agree to the extra \$25,000; which he did.

I would never have suggested that if he paid me \$25,000 more from the home sale that I would then give up \$75,000 in RRSPs that we had already agreed to with Mr. Leask and our lawyers.

[35] Therefore, if it were necessary to do so, Ms. Partington has convincingly repudiated Mr. Brown's contention.

[36] It is worth noting Ms. Partington's characterization of Mr. Brown's contention as "secret". It is implicit in Mr. Brown's evidence that the oral agreement he alleges was indeed secret, in the sense that the parties could not have informed their counsel of it, who were present, and who both signed the agreement. They would not have allowed their clients to sign a misleading document nor would they have done so themselves. In fact, the agreement provided that a court order would be obtained to reflect the terms of the settlement. No such order was obtained. However, the agreement to do so again demonstrates that the settlement agreement was intended to be binding and to be carried out in accordance with its terms.

[37] Mr. Brown's affidavits are highly argumentative. In them he makes several ancillary arguments that are intended to support his position.

[38] For example, he states that:

Significantly, there is a date in the Minutes for when I would provide the \$400,000 cheque. There is no date at all with respect to when there will be a roll-over of the RRSP's. The reason there is no date, and the reason Ashley agreed to that term as written by my lawyer, is because she had promised me to never actually request the transfer.

[39] He adds that since there was no date specified in the agreement, he is not in breach.

- [40] It is true that the settlement agreement does not stipulate a date for performance of the RRSP rollover. That does not make the term unenforceable. It is trite law that where the parties have not expressly stated the time of performance in their agreement, the law will imply a term that performance will occur within a reasonable time, which is to be determined upon the facts in the case: *Illidge v. Sona Resources Corporation*, 2018 BCCA 368, at para. 61.
- [41] When the minutes were signed, Ms. Partington had no RRSP account to which the RRSP rollover could be transferred. She had never held an RRSP account.
- [42] Ms. Partington applied to open a retirement savings accounts with Coast Capital Savings Credit Union on or about March 20, 2019. She also obtained RRSP transfer documents from the Credit Union. When Mr. Brown refused to execute the documents, she provided them to her counsel, who made demand on her behalf.
- [43] In the circumstances, the lack of any date for performance of the RRSP rollover leads to no inference that could assist Mr. Brown.
- [44] The specific reference to a date for transfer of the \$400,000 makes sense. This was a main feature of the agreement. Mr. Brown or his legal counsel had been holding the funds from the sale of the home for several months already.
- [45] Ms. Partington attended at Mr. Brown's home on March 20, 2019, a few days after the mediation, in order to obtain transfer of the Bronco. Mr. Brown contends that Ms. Partington agreed on that occasion that she would not insist upon the RRSPs. She denies that this conversation occurred. Mr. Brown argues that if she was going to insist on the RRSP rollover, she would have provided the rollover documents at the same time. He states:
- If she was always going to seek that I transfer the RRSP's I don't understand why she wouldn't bring me the documents when she provided the documents for the transfer of the Bronco.
- [46] This again leads to no inference that could assist Mr. Brown.
- [47] Ms. Partington says that the only reason the \$400,000 had a date attached to its transfer was because Mr. Brown's lawyer already had the money. However, the transfer of the Bronco and the RRSPs required insurance and paperwork involving two financial institutions. This all makes sense. In any event, the lack of dates for performance does not support Mr. Brown's contention.
- [48] Mr. Brown argues that Ms. Partington took \$60,000 in cash when she left. He contends that she removed the cash from a safe that was kept in the residence. She denies taking any cash. Mr. Brown's application response (but not his affidavits) contends that the parties came to the private agreement at the mediation because Ms. Partington took \$60,000 cash from the parties' safe when she left and she did not disclose it on her financial statement.
- [49] There is no foundation to this contention.

- [50] There is no evidence other than Mr. Brown's assertion to support the contention that Ms. Partington took cash from the safe. I note that Mr. Brown's financial statement makes no reference to this alleged family property, previously held by him.
- [51] Ms. Partington states that Mr. Brown received cash regularly, from a marihuana grow operation at a Chilliwack property in which he had a 50% interest. He denies receiving money from any marihuana grow operation. He states the money in the safe was from his tips as a chef throughout his many years of working at a restaurant. He does not explain why such a large amount of cash would be kept in a safe at the residence.
- [52] The whole matter of the safe, and the funds in the safe, is entirely collateral. It has no bearing on the issue of the enforceability of the RRSP rollover term.
- [53] Mr. Brown makes related statements about the cash, which are also not probative of anything. He contends that after separation Ms. Partington seemed to have some financial resources, as she was able to rent an apartment and furnish it. Ms. Partington says she had to borrow money from her sister. Mr. Brown questions whether Ms. Partington's sister had money to lend to her.
- [54] I am confident that no court would place any significant weight on Mr. Brown's various arguments.
- [55] At times Mr. Brown has contended that Ms. Partington's agreement to relinquish her claim to the RRSP funds occurred after the mediation. If so, there would be no consideration for her promise.
- [56] Certain comments Mr. Brown makes tend to show that Mr. Brown simply regrets entering into the settlement agreement. He says Ms. Partington left the relationship with \$400,000 from the sale of the family home that he owned prior to cohabitation. He says she received almost all of the increase in value of that home.
- [57] The settlement agreement was also made in recognition of spousal support claims. Mr. Brown argues that Ms. Partington is capable of earning the same amount as he does as a chef.
- [58] More broadly, there would hardly be a point in having formal agreements made at mediation in family matters if the solemn written obligations entered into could be so easily ignored.

IV. Conclusion, and Costs

- [59] The claimant's application is allowed. In accordance with para. 1 of the notice of application, the respondent shall provide a completed and signed T2220 RRSP transfer form to counsel for the claimant within 14 days, transferring \$75,000 in RRSPs from the respondent to the claimant by way of a tax-free spousal rollover under s. 146(16)(b) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

- [60] I note that there is no claim for damages for breach of the settlement agreement. Such damages could include gains forgone by Ms. Partington, or claims for disgorgement of gains made by Mr. Brown.
- [61] The claimant seeks special costs, or in the alternative, ordinary costs.
- [62] The claimant argues that Mr. Brown has been guilty of reprehensible conduct, citing C.L.M. v. M.J.S., 2017 BCSC 1517, which in turn cites para. 73 of Westsea Construction Ltd. v. 0759553 B.C. Ltd., 2013 BCSC 1352.
- [63] The claimant alleges that a number of actions by Mr. Brown, taken together, constitute reprehensible conduct deserving of rebuke through an award of special costs. Primarily, the claimant relies upon several spurious allegations made by Mr. Brown, and the claimant's contention that he has attempted to use his superior financial position to drag out the dispute and run up the claimant's legal costs, knowing that she cannot afford litigation. Also, she relies on his breach of the agreement itself. While there is some merit to these contentions, awards of special costs are exceptional, and in my view the conduct of Mr. Brown does not reach the level required for such an award.
- [64] Therefore, the claimant will have costs in accordance with SCFR Appendix B, assessed for matters of ordinary difficulty, in relation to all steps taken by the claimant in order to enforce the RRSP rollover provision of the minutes of settlement.

"Verhoeven J."

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