
CANADA / JUDGMENT

Pigdon v. Brackenridge

2013 BCSC 1778

COURT

Supreme Court of British Columbia

DECIDED

26 September 2013

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2013 BCSC 1778 Pigdon v. Brackenridge

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pigdon v. Brackenridge,

2013 BCSC 1778

Date: 20130926

Docket: 11-4550

Registry: Victoria

Between:

Charlene Dolores Pigdon

Claimant

And

Scott Brackenridge

Respondent

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

(Re: Costs)

Counsel for the Claimant:

Naomi McKay

The Respondent:

Appeared on his own behalf

Place and Date of Hearing:

Victoria, B.C.

August 12, 2013

Written Submissions by the Respondent:

Written Submissions by the

Claimant:

August 15, 2013

August 27, 2013

Place and Date of Judgment:

Victoria, B.C.

September 26, 2013

INTRODUCTION

- [1] The claimant, Charlene Dolores Pigdon and the respondent, Scott Brackenridge, lived together in a marriage-like relationship from February 2009 until March 2012. On the summary trial of this family law case, two matters were in issue. First and most significantly for the parties, the claimant and the respondent each claimed the net proceeds, in the amount of \$220,426.76 from the sale of their former residence, known as the "Farm". Second, Ms. Pigdon sought a declaration that she was the sole owner of the respondent's Ford F350 truck, or any vehicle purchased with the proceeds of sale of that truck.
- [2] At the conclusion of the summary trial, this Court determined that the claimant is the sole owner of the sale proceeds from the Farm. My order included a provision that the sum of \$20,000 remain in trust for a period of 30 days to permit two former creditors of the parties, Russell and Vera Gauthier, an opportunity to bring a claim to the \$20,000 within that time, failing which the sum of \$20,000 would be released to the claimant.
- [3] On the second issue, the Court dismissed Ms. Pigdon's claim to the respondent's truck.

Positions of the parties

- [4] The claimant submits that she was substantially successful at trial and is therefore entitled to the costs of this family law case. Ms. Pigdon also claims double costs, pursuant to Rule 11-1(5)(b), for all steps taken since her Offer to Settle of June 27, 2013.

- [5] For his part, the respondent argues that the offer was not one that he ought reasonably to have accepted. Mr. Brackenridge also says that he should be relieved from any obligation to pay costs, due to financial hardship.

BACKGROUND: FINDINGS AT TRIAL

- [6] My findings at trial included the following:

- (a) In February 2009, the claimant and the respondent purchased the Farm as joint tenants for the price of \$1,375,167.07. They financed the purchase in part with a first mortgage from their bank in the amount of \$800,000 and a second mortgage that secured a loan from Russell and Vera Gauthier in the amount of \$145,750.
- (b) The claimant contributed a total of \$461,748.52 to the purchase of the Farm.
- (c) The respondent contributed no funds to the purchase of the Farm.
- (d) The parties agreed that the respondent would make the mortgage payments and the claimant would pay their other expenses, which were expected to be roughly equal to the mortgage payments. In the result, the claimant and the respondent both contributed to the payment of the first mortgage. Their respective mortgage payments did not create any equity in the Farm because the parties refinanced and increased the loan secured by the first mortgage to \$999,000.
- (e) On August 3, 2012, the claimant applied for and obtained an order from the Honourable Mr. Justice Williams granting her interim exclusive possession and occupancy of the Farm, restraining the respondent from entering the Farm, and granting the claimant sole conduct of sale.
- (f) The claimant initially listed the Farm for sale at \$2.1 million and after a series of price reductions, sold the Farm in April 2013 for the price of \$1.4 million.
- (g) There was no admissible evidence before the Court to suggest that this was an improvident sale.
- (h) From the proceeds of sale, the parties paid \$1,001,627.80 to discharge the first mortgage and \$128,592.37 to discharge the mortgage in favour of Russell and Vera Gauthier. The net proceeds of sale in the amount of \$220,426.76 were held in trust pending the result of this proceeding.
- (i) I did not accept Mr. Brackenridge's submission that he made a substantial contribution to the enhancement and maintenance of the property through renovation work he performed on the Farm. I found that when the Court made the orders granting the claimant exclusive occupancy and prohibiting the respondent from continuing his renovation work, the Farm was in a state of disrepair. The condition of the Farm had deteriorated as a result of the respondent's renovation work, which contributed to the loss sustained by the claimant on her investment in the Farm.

- (j) The respondent had been enriched by his acquisition of an interest in the Farm as a joint tenant.
- (k) The claimant had suffered a deprivation through her contribution of over \$461,000 to the purchase of the Farm.
- (l) In the absence of any juristic reason for the enrichment, I found that Mr. Brackenridge had been unjustly enriched and ordered that the claimant receive the remaining sale proceeds.
- [7] The respondent did not succeed in arguing that a loan made to him by his bookkeeper, Ms. Kathryn Collins, in the amount of \$55,097.06 was a debt incurred to finance renovations to the Farm for which both he and the claimant were responsible, and which should be repaid to Ms. Collins from the sale proceeds. The evidence tendered at trial by Mr. Brackenridge on this issue was an inadmissible, unsworn hearsay statement from Ms. Collins.

DISCUSSION

- [8] I will begin by addressing Ms. Pigdon's claim for the ordinary costs of this family law case before turning to her claim for double costs for all steps taken after she delivered her Offer to Settle of June 27, 2013.

Success in the Litigation

- [9] Rule 16-1(7) of the Supreme Court Family Rules provides:
 - (7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.
- [10] Here, the claimant was entirely successful on the most significant issue in dispute, the ownership of the net proceeds of sale of the Farm. Although the respondent successfully resisted Ms. Pigdon's claim to his truck, the argument on that issue occupied very little time, and concerned an asset with a value of about \$3,000. Viewing the matters in dispute globally, I have no difficulty in finding that the claimant achieved substantial success in the event.

Should the Court exercise its discretion to order otherwise?

- [11] In *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180, the Court of Appeal discussed the factors that a trial judge may take into account in exercising the court's discretion at para. 20:

The question, then, is: when should the Court order otherwise? With respect, when the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of Court. To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful because the facts and issues in each family law case vary so greatly. Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular

case, however, is a matter best left for determination by the trial judge.

- [12] The onus of persuading the Court that it should depart from the usual rule that the successful party is entitled to costs rests on the unsuccessful litigant: *Rattenbury v. Rattenbury*, 2001 BCSC 593 at para. 8.
- [13] Here, there has been no misconduct on the part of the claimant that would disentitle her to an order for costs.
- [14] The respondent says that as a result of the order of August 3, 2012 granting the claimant interim exclusive possession and occupancy of the Farm and restraining him from entering the premises where he kept his tools and equipment, his business as a homebuilder was disrupted and that he has only recently obtained probationary employment in Vancouver as an ironworker. Mr. Brackenridge says that he has no assets other than his truck and his personal effects, and that an order for either ordinary or double costs would cause him hardship.
- [15] The respondent has an obligation to pay \$250 per month as child support for his daughter by another relationship, and is currently paying rent of \$500 per month while employed in Vancouver.
- [16] Mr. Brackenridge does not appear to have any savings and is indebted to Ms. Kathryn Collins in the amount of \$55,097.06. In addition, the respondent maintains that he is indebted to his father in the amount of \$40,000 and to his brother in the amount of \$30,000. Mr. Brackenridge has not adduced evidence of the terms, if any, for repayment of the amounts advanced by his father and brother. Nor has he provided an accounting for his expenditure of those funds.
- [17] Mr. Brackenridge has advised the Court that he is currently working up to 10 hours a day, six days a week as an ironworker at an hourly rate of \$31.80. He has produced a pay stub confirming that hourly rate and showing an hourly overtime rate of \$47.70. As a skilled tradesman, the respondent has the capacity to earn a steady income. Leaving aside overtime, and assuming he works 40 hours a week at the hourly rate of \$31.80, Mr. Brackenridge is able to earn a gross monthly income of at least \$5,088 (40 hours x \$31.80 x four weeks).
- [18] I accept that in the apparent absence of savings to draw upon, and with his outstanding obligations to repay the monies advanced to him by Ms. Collins, and perhaps also by his father and brother, an award of ordinary costs may result in some financial hardship to the respondent. However, I am also satisfied that the respondent has the earning capacity enabling him to pay an award of costs for this summary trial proceeding.
- [19] While financial hardship is a factor for the Court to consider, it is insufficient on its own for departure from the usual rule that costs should follow the event: *S.D.W. v. C.E.W.W.*, 2006 BCSC 162, citing *Richter v. Richter* (2004), 6 C.P.C. (6th) 181, 2004 BCSC 214.

[20] In my view, the respondent has failed to establish any basis for a departure from the usual rule that costs should follow the event. Accordingly, the claimant will have her costs of this family law proceeding.

The Claimant's Offer to Settle

[21] I turn now to the claimant's Offer to Settle.

[22] On June 27, 2013, the claimant, through counsel, made the following Offer to Settle pursuant to Rule 11-1 of the Supreme Court Family Rules:

1. You will receive \$15,000 from the funds currently held in trust at Quadra Legal:
2. You will retain your truck and utility trailer free from any claim by Ms. Pigdon:
3. You will be solely responsible for repayment of any funds you received from Kathryn Collins:
4. The \$20,000. representing the disputed sum with respect to the Gauthier mortgage, will remain in trust pending an agreement between you and Ms. Pigdon and the Gauthiers:
5. Ms. Pigdon will receive the balance of the funds held in trust at Quadra Legal:
6. All other claims arising out of your relationship will be dismissed, as if tried on their merits.

This offer is open for acceptance until Friday June 28, 2013 at 2:00 p.m. P.S.T.

The Claimant, Charlene Pigdon, reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding.

We confirm that should you not accept the offer, we are instructed to make an application for a final order that Ms. Pigdon receive the entirety of the funds in trust as well as your truck and trailer in addition to costs payable by you to her.

Again we strongly recommend you speak to a lawyer about the merits of your claims and the consequences of rejecting Ms. Pigdon's offer.

[23] The claimant made her Offer after the Farm had been sold and the mortgages held by the Toronto Dominion Bank in the amount of \$1,001,627 and by Russell and Vera Gauthier in the amount of \$128,592.37 had been paid out and discharged.

[24] The Offer was delivered to Mr. Brackenridge at 11:22 a.m. on June 27, 2013 and was in the form required by Rule 11-1.

[25] Rule 11-1(4) provides that the court may consider an offer to settle in exercising the court's discretion in relation to costs.

[26] Under Rule 11-1(5), where an offer to settle has been made, the court may do one or more of the following:

- (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
- (b) award double costs of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
- (c) award to a party, in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;

[27] Rule 11-1(6) provides:

- (6) In making an order under subrule (5), the court may consider the following:
 - (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.

[28] Rule 11-1 is intended to encourage the early settlement of litigation by rewarding the party who makes a reasonable offer and penalizing the party who declines to accept such an offer. An award of double costs punishes a party who fails to accept an offer to settle that should, in all of the circumstances, have been accepted: *Hartshorne v. Hartshorne*, 2011 BCCA 29.

Was the Claimant's Offer to Settle one that ought reasonably to have been accepted?

[29] Whether an offer ought reasonably to have been accepted must be determined as at the time the offer was open for acceptance, rather than by reference to the judgment pronounced at trial: *Hartshorne v. Hartshorne*, at para. 27.

[30] Although the Offer stated that it was open for acceptance until 2:00 p.m. on June 28, 2013, counsel for Ms. Pigdon delivered the Offer to the respondent with a covering letter by which she advised Mr. Brackenridge that she would be on holiday for the following two weeks and provided him with a telephone number where she could be contacted during that time. Claimant's counsel also strongly recommended that Mr. Brackenridge obtain independent legal advice concerning the Offer. I find that in these circumstances, the claimant afforded the respondent a reasonable opportunity to evaluate her Offer, and encouraged Mr. Brackenridge to seek legal advice respecting her Offer, the merits of his claims and the consequences of rejecting Ms. Pigdon's Offer.

- [31] Unfortunately, Mr. Brackenridge did not seek legal advice. Mr. Brackenridge responded to the claimant's Offer on June 28, 2013 with a counterproposal that he would accept the claimant's terms provided the debt of \$55,097.06 due to Ms. Kathryn Collins was also paid from the sale proceeds. The respondent maintained that debt was incurred with the knowledge and consent of the claimant for the purpose of financing renovations to the Farm and that he and the claimant were jointly responsible for the payment of this loan.
- [32] At the time he received the claimant's Offer to Settle, the respondent knew the claimant denied any liability for the loan from Ms. Collins. Mr. Brackenridge had also disclosed banking records indicating he had used some of the funds advanced by Ms. Collins to pay for his living expenses, rather than renovations. In the absence of any loan document signed by the claimant, the respondent ought to have understood that he faced an uphill battle in seeking to establish that the loan from Ms. Collins was a joint debt that should be paid from the proceeds of sale of the Farm.
- [33] When the respondent received the claimant's Offer, he also ought to have understood that in light of Ms. Pigdon's disproportionate contribution to the purchase of the property she would likely receive the greater part, if not all of the net proceeds of sale if the case went to trial.
- [34] Earlier, by correspondence to Mr. Brackenridge dated February 8, 2013, counsel for the claimant had summarized Ms. Pigdon's contributions to the Farm and explained the rationale for her client's position that the respondent had no entitlement to any of the sale proceeds.
- [35] Mr. Brackenridge's argument that his renovation work, if completed, would have increased the value and the marketability of the Farm had been rejected by the Court in August 2012 when Ms. Pigdon was granted interim exclusive occupancy of the Farm. The respondent ought to have understood, and probably would have been so advised had he consulted a lawyer, that his claim for compensation for his "sweat equity" resulting from the renovation work had no realistic prospect of success. Further, the renovation work actually performed by Mr. Brackenridge had not enhanced the value of the property. The Farm had sold in April 2013 for \$1.4 million, after a series of price reductions.
- [36] By offering payment of \$15,000 to the respondent, the claimant provided some incentive for Mr. Brackenridge to settle.
- [37] Taking all of these factors into account, I find that the claimant's Offer to Settle of June 27, 2013 was a reasonable offer which the respondent ought reasonably to have accepted. In light of the consequences of a decision to accept or reject the Offer, the respondent was entitled to a reasonable time to evaluate the claimant's Offer to Settle. I am satisfied by the covering letter from claimant's counsel, which encouraged the respondent to seek legal advice and provided information about how she could be contacted during the following two weeks, that had the respondent sought a reasonable extension of time to consider the Offer, the claimant would have granted that extension. A week would have been a reasonable time

for Mr. Brackenridge to evaluate the Offer, and if he so chose, to obtain legal advice. I conclude that the claimant's Offer to Settle ought reasonably to have been accepted by no later than July 5, 2013.

The relationship between the terms of Offer to Settle and the Judgment of Court

- [38] The Offer to Settle, by providing for payment of \$15,000 to the respondent was more favourable to him than the final judgment of the Court. This factor weighs in favour of an award of double costs.

Relative Financial Circumstances of the Parties

- [39] I have already discussed the respondent's lack of assets of any substantial value, his financial obligations, and his income earning capacity.
- [40] For her part, when the claimant met Mr. Brackenridge, she enjoyed financial security from the settlement she received following the breakdown of her 27-year marriage to her former husband. By that settlement, she retained assets valued at \$1,178,711 and received monthly spousal support of \$8,000 until July 2010. The claimant had not worked outside the home during her marriage and relied upon the assets she retained from the settlement for economic self-sufficiency. The claimant has now substantially depleted those assets. In addition to the monies she invested in the purchase and maintenance of the Farm, Ms. Pigdon invested \$350,000 in Island View Golf Centre Ltd., a business venture of the respondent that has failed. Foreclosure proceedings are underway. The claimant is unlikely to recover much, if any of her investment in that venture. The claimant is no longer financially self-sufficient and is unlikely to recoup all of her losses. She has also incurred the expense of pursuing this action to trial.
- [41] The claimant's financial resources have been significantly depleted by the investments she made during her relationship with the respondent. Through this proceeding, she has recovered less than half of the monies she invested in the purchase and maintenance of the Farm. Mr. Brackenridge has also suffered the consequences of poor financial decisions, including his unsuccessful golf course project.
- [42] The respondent retains none of the proceeds of sale of the Farm. However, unlike the claimant, he has the capacity to support himself through a skilled trade.
- [43] An award of double costs for steps taken in this action after July 5, 2013, while imposing an additional financial burden upon the respondent, would not impose an unduly harsh burden. Costs of a family law proceeding are assessed under the Schedule to Appendix B of the Supreme Court Family Rules. The principal item of costs incurred by the claimant after delivery of her Offer to Settle was item 7, which concerns preparation for and attendance at trial. Under item 7 of the Schedule, costs for preparation and attendance at the trial of a family law case are assessed at \$2,000 per day for each day of trial. Here, the summary trial occupied one day. An award of double costs after July 5, 2013, restricted to item 7 would

result in an increase of \$2,000 in the costs payable by the respondent to the claimant. That result would not be so harsh or punitive as to warrant the exercise of the Court's discretion against an award of double costs.

Other Factors

[44] Had the respondent accepted the claimant's Offer, both parties would have been spared the time and cost of preparing for and conducting the one-day summary trial of this proceeding.

CONCLUSION

[45] Taking all of these factors into account, and bearing in mind that the purpose of Rule 11-1 is to encourage settlement by rewarding a party who makes a reasonable offer, I conclude that the claimant is entitled to the costs of this proceeding, and in addition, to an order for double costs under Item 7 of the Schedule for preparation for and conduct of the summary trial of this action.

"PEARLMAN J."

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