

CANADA / JUDGMENT

Sarband v. Joubin

2020 BCSC 1477

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1477 Sarband v. Joubin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sarband v. Joubin,

2020 BCSC 1477

Date: 20200904

Docket: S172815

Registry: New Westminster

Between:

Sara Mohammadi Sarband

Plaintiff

And

Ramin Joubin

Defendant

Before: Master Cameron

Oral Reasons for Judgment

Counsel for Plaintiff:

M. Magaril

Counsel for Defendant:

P. Cote

Place and Date of Hearing:

Vancouver, B.C.

September 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

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Introduction

- [1] The plaintiff, Sara Sarband, applies for a declaration that the defendant, Ramin Joubin, has waived privilege in respect of communications between himself and his solicitors, relating to the litigation strategy and decisions made as to the evidence to be called in the defence of the underlying breach of contract action that proceeded to trial before Mr. Justice Masuhara over eight days between July 18, 2018, and December 5, 2018. The application has been brought in the context of a pending application brought by the defendant to reopen the trial to call the evidence of the plaintiff's parents who did not testify at trial.

Background

- [2] After an eight-day trial concluded in December 2018, Mr. Justice Masuhara delivered reasons for judgment on January 31, 2019, indexed at 2019 BCSC 116. To put this application in its full perspective, I refer to the reasons for judgment as follows:
- [1] These Reasons deal with a breach of contract action regarding an agreement the parties entered into on September 3, 2008. The agreement deals with the resolution of financial matters following the breakdown of their marriage. The plaintiff, Dr. Sarband says that her former husband, Mr. Joubin, failed to pay his share of a debt under the agreement. She asserts that Mr. Joubin's share at the time of the agreement was \$75,000 and that since Mr. Joubin made a partial payment to her in 2008 of \$5,000, he owes her approximately \$70,000 plus interest.
- [2] The agreement is dated August 29, 2008 and is titled as "Separation Agreement". The agreement was drafted by plaintiff's solicitor. These Reasons will refer to it as the "Agreement."

- [3] Though the Agreement relates to the resolution of financial matters in relation to a breakdown in the marriage, Dr. Sarband's claim is not pursued as a family law case. Rather, she seeks relief under the civil rules of court as opposed to the family rules. It seems that the opportunity for relief under the Family Rules has expired. Nonetheless, the family law context is relevant to discerning the intention of the parties in the Agreement.
- [6] The key issues to resolve are:
- (a) Was there a collateral agreement or pre-Agreement contract or representation?
 - (b) What were the intentions of the parties in the Agreement? Was there to be an equal sharing of the \$150,000 debt? Or was there to be an accounting in the end to determine each party's responsibility for the debt, if any?
 - (c) If a debt is owing by Mr. Joubin, is this action precluded by the expiration of a limitation period?
- [7] For the reasons that follow, I find that there was no pre-Agreement or collateral agreement, as asserted by Mr. Joubin. I also conclude that the intent of the Agreement, though not drafted as clearly as one would expect, was to deal with the resolution of financial matters arising from the marriage breakdown and to equally divide the responsibility for a line of credit debt incurred during the marriage of \$150,000. As well, I am not persuaded that the action is barred by the expiry of a limitation period. In this regard, I find that Dr. Sarband had the ability under the Agreement to seek payment of the entire unpaid amount from Mr. Joubin as of August 23, 2013.

Background

- [8] The parties were married August 29, 2002. They met while attending Douglas College and transferred to U.B.C. for undergraduate studies. Each had student loans to fund their education at the two schools. They maintained separate accounts and paid their own way during their undergraduate studies.
- [9] Dr. Sarband was studying with the hope of going to medical school. She was successful and was accepted to attend a medical school in the Cayman Islands starting in March 2006. Mr. Joubin applied to attend a law school there as well and was successful.
- [10] Dr. Sarband, in advance of moving to the Cayman Islands, learned that the Royal Bank of Canada offered a line of credit to students attending international medical schools. In June 2006, she obtained such a line of credit with a limit of \$150,000. She was the only signatory to the line of credit agreement. Mr. Joubin did not qualify for such a facility.
- [11] Dr. Sarband testified that Mr. Joubin attended the bank with her when she obtained the line of credit. Mr. Joubin denies he did.

- [12] The parties moved to the Cayman Islands to attend school in 2006. They rented a small studio apartment. Unfortunately, things did not go well in the relationship and the parties separated in or around July 2007. They continued to live under the same roof, but lived largely separate lives and continued with their respective studies.
- [13] In about July 2008, Dr. Sarband returned to Vancouver as she had concluded her studies in the Cayman Islands and was to start a medical student residency in the United States. Mr. Joubin returned to Vancouver shortly after Dr. Sarband. While in Vancouver, Dr. Sarband retained a family law solicitor who drafted an agreement regarding the resolving any issues arising from their marriage and in particular the debt under her line of credit. She met Mr. Joubin in late August 2008 to provide him a copy of the draft and to discuss it. During their discussion, Mr. Joubin says that he told Dr. Sarband that he was unaware of the line of credit and debt. He says that he told Dr. Sarband that he would not agree to pay one-half of the line of credit. He says that Dr. Sarband was dismayed as she wished to quickly resolve matters between them so she could move on. He testified that since he cared for her and also wished to resolve things, he said to her that he would sign the Agreement if she could show him the amount she says he owed her. He says she agreed to do so. Based on this, Mr. Joubin took the draft to review and later sent Dr. Sarband his comments insisting on the deletion of various provisions. Those provisions were the following:
- J. There have been no previous separation or marriage agreements between the parties.
- K. It is the intention and desire of the Parties that there shall be a complete, final and effective settlement of their respective rights in and to the property of each other and the property held by them jointly and responsibility regarding their debts, as well as their rights and obligations regarding spousal support, and of all other claims of any kind or nature which either party may now or hereafter have against the other.
10. This Agreement is a full and final settlement of all issues between Sara and Ramin and all rights and obligations arising out of their relationship.
12. There are no representations, collateral agreements, warranties or conditions affecting this Agreement. There are no implied agreements arising from this agreement and this agreement between the parties constitutes the complete agreement between them.
21. Sara and Ramin herewith acknowledge that they have received independent legal advice with respect to the legal effect of this Agreement and with respect to the alternatives available to him or to her instead of signing this Agreement or alternatively have had independent legal counsel recommended to them and have elected not to obtain the same.
- [14] The deletions were made and the agreement was executed by both.
- [15] The parties obtained a divorce in October 2008.

- [16] In October 2008 Mr. Joubin paid Dr. Sarband \$5,000. He borrowed this sum from his mother. This is less than the \$10,000 he was to pay on November 1, 2008. Mr. Joubin made no further payments. He sent a general non-specific email to Dr. Sarband shortly after this. She testified that she received the communication but chose not to respond. Mr. Joubin testified that he contacted Dr. Sarband hoping to speed up resolution of the issues by obtaining the documents establishing his debt but acknowledged made no request for the documentation.
- [14] Her only communications was through service upon him on August 20, 2015, of her Notice of Civil Claim of this proceeding. This is six year, nine months and eighteen days from November 2, 2008, the day his first payment was due under the Agreement.

Discussion

- [22] I start by noting my observation from trial that neither party was a strong witness. The passage of time has eroded not only memories but also the availability of documentation. No doubt the desire of both to move forward separately from their failed marriage played a role here.
- [23] The limited production of documentation by either party and their failure to call other witnesses, such as their parents, who were referred to in each party's testimony on important aspects limited the strength of the key assertions of each side.
- [24] A key exercise here is to discern the intention of the parties in the Agreement. This involves viewing the text of the document as a whole and in the context of the surrounding circumstances that gave rise to the agreement. Consideration of the surrounding circumstances, however, is not to overwhelm the words used (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57). As mentioned, the family law context in which the Agreement was drafted is a factor in the exercise.

Conclusion

- [37] The action is allowed. The debt of Mr. Joubin has been established as \$70,000 plus interest. If the parties are unable to establish the calculation of interest, the matter is referred to the Registrar for a report and recommendation.
- [38] The plaintiff is awarded costs at Scale B.
- [3] After the release of the reasons for judgment, counsel for both parties could not agree on the terms of the form of the order to be submitted. Counsel for the defendant endorsed a form of order providing for Scale B costs in favour of the plaintiff, and counsel for the plaintiff sought full indemnity costs based upon the terms of the separation agreement. Ultimately no order was entered, and the parties appeared back before Mr. Justice Masuhara.

- [4] On October 25, 2019, Mr. Justice Masuhara delivered supplementary reasons awarding the plaintiff costs on an indemnity basis under the agreement, with the amount to be assessed by the Registrar.
- [5] Counsel for the defendant shortly thereafter advised that he would be filing an application to reopen the trial to introduce the evidence of the plaintiff's parents, Shahla Zaratkar and Rahim Mohammadi Sarband.
- [6] On March 13, 2020, this application was filed, and the orders sought include:
- 1) leave to be granted for the respondent to reopen the trial to introduce the evidence of Shahla Zaratkar and Rahim Mohammadi Sarband;
 - 2) Shahla Zaratkar and Rahim Mohammadi Sarband are to produce all bank records and statements for all bank accounts into which funds from the RBC line of credit number 59576975-001 were deposited or were jointly owned with the plaintiff from 2006 to 2008;
 - 3) leave be granted for the defendant to examine Shahla Zaratkar and Rahim Mohammadi Sarband under oath regarding the funds from RBC line of credit number 59576975-001 and joint bank accounts held with the plaintiff from 2006 to 2008.
- [7] The legal basis for the application included the following:

The defendant seeks to reopen his case to adduce fresh evidence that is in the possession of the plaintiff's parents in the form of bank records of accounts jointly held with the plaintiff and testimony under oath regarding their use of the funds of the line of credit at issue.

- [8] In this case, the defendant did not call the plaintiff's parents as witnesses as it was expected the plaintiff would be able to explain what occurred with the funds from the line of credit sufficiently, and given her own evidence that she withdrew the funds from the line of credit and that the defendant had no access. The defendant did not anticipate the plaintiff would make no attempts to provide bank statements to prove her claim.
- [9] This application is set for hearing before Mr. Justice Masuhara on November 27, 2020, and in response to the application, the plaintiff filed this application on June 22, 2020, seeking a declaration that by bringing the application to reopen the trial, the defendant has waived privilege in respect of all communications relating to, inter alia, the decision not to call the plaintiff's parents as witnesses and not to seek an adjournment of the trial to interview the plaintiff's parents and to then call their evidence before the trial concluded.

The Position of the Parties

- [10] Counsel for the plaintiff submitted that while the law recognizes the sanctity and importance of solicitor-client privilege, that privilege could be waived where a party puts his or her state of mind in issue. Where a party's state of mind is at issue, the scope of waiver can extend to the knowledge and investigations of counsel: see *Araya v. Nevsun Resources Ltd.*, 2019 BCCA 205.
- [11] Counsel also relied upon *Pro-Suite Software Ltd. v. Infokey Software Inc.*, 2015 BCCA 52, that confirms aside from an express or implied waiver, waiver can be found where fairness and consistency so require, even where there is no intention to waive whatsoever.
- [12] It was submitted that the defendant has caused his state of mind to become relevant because he now says he did not anticipate in her evidence the plaintiff would not provide a full accounting of the disbursement of funds from the line of credit, including, transfers to an account or accounts with one or both of her parents.
- [13] To defend the pending motion to reopen the trial, counsel for the plaintiff asserts that fairness and consistency require that the solicitor's brief of the defendant be opened up to review the litigation strategy that resulted in the decision being taken not to call the plaintiff's parents as witnesses.
- [14] Counsel for the defendant opposes the application, submitting that the defendant's state of mind is not an issue at all and that fairness and consistency do not require any disclosure of otherwise privileged communications. In his response he said:

In this case the defendant does not dispute that it was open to counsel to stand down and call the parents after hearing the plaintiff's evidence at trial. The comment explains the delay in making the application, but is not a consideration in determining whether a miscarriage of justice would occur if the trial is not reopened. The defendant's statements made in his application to reopen the trial are not a form of evidence the court will consider in whether to grant an application to reopen the trial. They do not go toward the test to reopen and do not put the defendant's state of mind at issue. The defendant's state of mind is not a relevant consideration in the test to reopen the trial.

- [15] Counsel relied upon *Zhu v. Li*, 2007 BCSC 1467. In that case Mr. Justice Ehrcke said at para. 20:
- [20] From the cases, I conclude that the following principles apply to an application to re-open a trial to adduce fresh evidence:
1. Prior to the entry of the formal order, a trial judge has a wide discretion to re-open the trial to hear new evidence.
 2. This discretion should be exercised sparingly and with the greatest care so as to prevent fraud and abuse of the court's process.

3. The onus is on the applicant to show first that a miscarriage of justice would probably occur if the trial is not re-opened and second that the new evidence would probably change the result.
 4. The credibility of the proposed fresh evidence is a relevant consideration in deciding whether its admission would probably change the result.
 5. Although the question of whether the evidence could have been presented at trial by the exercise of due diligence is not necessarily determinative, it may be an important consideration in deciding whether a miscarriage of justice would probably occur if the trial is not re-opened.
- [16] Counsel submitted that whatever investigations he undertook and whatever instructions he received from the defendant about whether or not to call certain witnesses will not be a relevant consideration on the application to reopen the trial; rather, it will be his onus to show that a miscarriage of justice would probably occur if the trial is not reopened, and second, that the new evidence would probably change the result.

Discussion

- [17] In my view, the circumstances of this case do not establish that there has been any waiver of privilege or that fairness and consistency require that the defendant provide disclosure of his solicitor's brief. The defendant has conceded that he was aware of the potential relevance of the evidence that the plaintiff's parents could give about the use and ownership of the funds in the line of credit even before the trial commenced. As such, there is no question about the defendant's state of mind. A decision was made not to call these two witnesses.
- [18] The pending application to reopen will be decided on the principles stated respecting preventing a miscarriage of justice, and the disclosure sought by the plaintiff will not be relevant to that inquiry.
- [19] The application is dismissed with costs to the defendant at Scale B not payable forthwith.

"Master Cameron"

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