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CANADA / JUDGMENT

## Sidhu v. Sidhu

2010 BCSC 1603

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COURT

Supreme Court of British Columbia

DECIDED

15 November 2010

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2010 BCSC 1603 Sidhu v. Sidhu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sidhu v. Sidhu,

2010 BCSC 1603

Date: 20101115

Docket: E091451

Registry: Vancouver

Between:

Jasbeer Singh Sidhu

Plaintiff

And

Jassjeet Kaur Sidhu

Defendant

Before: The Honourable Madam Justice Russell

Supplemental Reasons for Judgment

Counsel for Plaintiff:

J. Dubas

Counsel for Defendant:

G. Thomas

Place and Date of Hearing:

Vancouver, B.C.

May 7, 2010

Place and Date of Supplemental Reasons for Judgment:

Vancouver, B.C.

November 15, 2010

## INTRODUCTION

- [1] This is an application by the plaintiff seeking a reconsideration of my decision of May 7, 2010. It is the latest legal step in proceedings between the parties in this family action.
- [2] The parties and their counsel participated in a Judicial Settlement Conference (the "JSC") on January 13, 2010. With effort and compromise by both parties, they were able to settle the outstanding matters between them. Plaintiff's counsel undertook to draft the minutes of settlement.
- [3] On May 7, 2010, the parties appeared before me again in Chambers (the "May 7 Hearing"). The plaintiff applied for a declaration that the parties had not reached a binding settlement at the JSC, or, in the alternative, that if the parties had reached an agreement the conduct of the parties since had rendered any agreement unenforceable, or that the agreement was otherwise unenforceable as it would be inequitable, unreasonable or unconscionable to enforce the agreement.
- [4] The defendant sought a declaration that the parties had settled all issues between them at the JSC, and orders that the terms as agreed by the parties be reduced to minutes of settlement and an order, that the action be stayed generally except as to efforts to finalize the agreement, and that the defendant be awarded her costs thrown away at Scale C.
- [5] At the conclusion of the May 7 Hearing, I gave Oral Reasons for Judgment (the "May 7 Reasons"), (7 May, 2010), Vancouver E091451 (S.C.), in which I:
  - 1. declared that the parties had settled the issues between them at the JSC, with the exception of some minor items;
  - 2. ordered that the minutes of settlement drafted by Defendant's counsel, Mr. Thomas, and before me at the May 7 Hearing (the "May 7 Minutes"), be generally accepted;
  - 3. ordered that the final minutes of settlement be the May 7 Minutes with certain limited amendments to reflect discussions between the parties during the May 7 Hearing as outlined in the May 7 Reasons (the "Final Minutes");

4. ordered that if the parties were unable to agree on wording to articulate the agreement reached during the JSC and the May 7 Hearing, they provide drafts to me, in writing. I would then choose from between them the wording which better reflected the agreement;
  5. ordered that the action *Sidhu v. Sidhu*, Vancouver E091451 (S.C.) be stayed generally except as to efforts to finalize the details of the Final Minutes; and
  6. ordered that the plaintiff pay the defendant her costs thrown away for 2.5 days of proceedings at Scale B (collectively, the "May 7 Order").
- [6] In summary, I determined that an agreement had been reached at the JSC, with the exception of certain minor terms which were finalized at the May 7 Hearing, and that the ongoing disputes between the parties were caused by their inability to agree on how to articulate the agreement.
- [7] The May 7 Order has not yet been entered. In late August 2010 and early October 2010, I received written submissions from counsel indicating that they have been unable to agree to some of the wording in the Final Minutes.
- [8] The plaintiff has both appealed the May 7 Order and brought this application for reconsideration.

## ARGUMENTS AND LAW

- [9] The plaintiff applies for reconsideration on the basis that "the draft presented by [defendant's] counsel contains several orders that were not agreed to, drafting mistakes, and is in fact in many respects not consistent with the agreement reached by the parties as found by this Honourable Court." The plaintiff says that the May 7 Order should be "reconsidered, adjusted, or varied in accordance with the agreement [the Court] found was reached between the parties at the [JSC], [the Court's] other directions, and in other ways to ensure inadvertent drafting and slips do not unfairly upset the settlement."
- [10] In his August 26, 2010 submissions to the Court regarding draft wording, plaintiff's counsel submits that, in light of the history of the proceedings and my order that counsel submit wording if they could not agree, "it appears that the Court at this stage, has authority to make changes to the minutes of settlement in accordance with any agreement reached on January 13, 2010 without a further application be [sic] brought. If the Honourable Madam Justice Russell believes that a further application is required, we have brought the application for reconsideration of the May 7, 2010 Order..."

- [11] Plaintiff's counsel says that "the court has a broad jurisdiction before the settlement of an order to reconsider and vary an order to accord with the court's true intentions to avoid inadvertent slips and injustice between the parties". Curiously, counsel also says in support of his client's application, that reconsideration is "often considered preferable to an unnecessary appeal". I say curiously because, as I have said, the plaintiff has both appealed the May 7 Order and applied to have me reconsider that order.
- [12] In response, defendant's counsel says that his client wants this matter concluded and that the plaintiff seeks to "prolong [the process] unnecessarily and for no good reason" because "he did not like the decision made by the court". Defendant's counsel further says that case law suggests that where a court's decision has been appealed, it is inappropriate for the court to reconsider the decision made lest the judge become an advocate for his or her own position. In any event, he says, the plaintiff is not challenging the decision but counsel's enunciation of that decision and that is not a proper matter for reconsideration.
- [13] Both parties cite *Banyay v. Insurance Corp. of British Columbia* (1996), 17 B.C.L.R. (3d) 216, 69 B.C.A.C. 208 (C.A.) and *Scarr v. Gower* (1956), 2 D.L.R. (2d) 402, 18 W.W.R. 184 (B.C. C.A.). The plaintiff says that in these cases "the court recognizes that where an appeal is filed, reconsideration is sometimes to be discouraged because there would be a tendency for the original judge, who is being appealed, to supplement their reasons unfairly to effectively correct any error on the record, doing away with the appeal" but that "where the court does not use the reconsideration to simply provide amplified reasons to justify the original decision, but truly, comes to an alternate decision that represents curing a perceived error, even on no new evidence, this reconsideration, even in the fact [sic] of an appeal, is to be preferred because it avoids the Court of Appeal having to speculate as to what the true intention of what the original judge was in making the order...".
- [14] Neither of these cases is specific to reconsideration and I find that neither assists on the facts of this case. *Scarr* cautions that when Supplemental Reasons are issued after a notice of appeal has been filed, a trial judge may be tempted to advocate for his or her own decision. In that case, the trial judge issued Supplemental Reasons referring to material not before him in support of his decision. The appeal panel allowed the appeal but the majority did not criticize the trial judge for issuing Supplemental Reasons, saying he had not fallen into the error of trying to support his judgment.
- [15] In *Banyay*, the trial judge issued Supplemental Reasons in the face of an appeal because "he had misconceived the evidence". The basis for the conclusions in his Supplemental Reasons was the same as in his original Reasons. The Court said the following, at para. 29, about a judge's ability to supplement or amend his or her reasons before a formal order is entered:

In my view, a judge is entitled, prior to a formal order being entered, to supplement or amend delivered Reasons for Judgment, particularly after an error has been identified. In many cases, where the error does not change the grounds upon which the delivered decision is based, and submissions on the point have been previously made, it would not be necessary to receive further

submissions. In this case, for example, it would have been proper for the trial judge to have delivered Supplemental Reasons for Judgment identifying the error and stating, as he did, that the new and correct appreciation of the facts did not persuade him, for the reasons he gave, to change the result already published.

The Court of Appeal determined that there was ample evidence to support the trial judge's conclusion in spite of his original misapprehension of the facts. It nevertheless set aside the Supplemental Reasons "as a debt of justice" because the parties had not been given the opportunity to argue the facts as raised in the Supplemental Reasons.

- [16] The reasoning in *Banyay* is support for the proposition that where Supplemental Reasons for Judgment do not change the trial judge's decision or the basis for that decision, they may be appropriate to rectify errors of fact in the original judgment. That case is not authority for the proposition that a trial judge may issue Supplemental Reasons which arrive at a different conclusion than did the original Reasons for Judgment, as suggested by Plaintiff's counsel.
- [17] Plaintiff's counsel also asked the Court to consider *United Mexican States v. Metalclad Corp.*, 2001 BCSC 1529, [2002] 95 B.C.L.R. (3d) 169 in which Mr. Justice Tysoe issued Supplemental Reasons which varied the terms of an un-entered order which had been settled by the Registrar.
- [18] In that case, Mexico successfully demonstrated that two decisions by a tribunal constituted under Chapter 11 of the North American Free Trade Agreement (the "Tribunal") were beyond the scope of the submission to arbitration. The resulting order remitted certain decisions to the Tribunal.
- [19] Metalclad attempted to bring the matter back before the Tribunal, as contemplated by the order. The Tribunal could not accept the remission because the Court had not adjourned the matter, as required by s. 34(4) of the Tribunal's governing statute. Metalclad therefore applied for directions respecting the reference, to settle the order and for an order adjourning the proceedings to permit the Tribunal to reconsider the matter in accordance with the reasons.
- [20] Mexico argued that these were not appropriate circumstances in which to reopen proceedings.
- [21] Mr. Justice Tysoe varied the order, saying, at para. 14:

[I]t was inappropriate for me to have followed the usual common law approach of partially setting the Award aside and remitting the matter to the Tribunal. I should have clarified whether Metalclad was requesting me to adjourn the proceedings under s. 34(4) if I concluded that there were grounds to set aside the Award in whole or in part and, if Metalclad had made such a request, it would have been appropriate for me to adjourn the proceedings to give the Tribunal an opportunity to deal further with the matter in view of my conclusion that breaches of Article 1105 and Article 1110 could not be founded on an obligation of transparency.

- [22] In doing so, he found that the Registrar had correctly settled the form of the order in accordance with the Reasons for Judgment, and therefore rejected the argument that what was before him was merely an application for directions with respect to the terms of the order. He also rejected the argument that he could not vary the order because there was a pending appeal.
- [23] In addition to *United Mexican States*, I have considered *Aquiline Resources Inc. et al. v. Wilson et al.*, 2005 BCSC 1461, 2005 CarswellBC 2502, *Cheema v. Cheema*, 2001 BCSC 298, 89 B.C.L.R. (3d) 179, and *Parker Cove Properties v. Freeborn*, 2009 BCSC 920, 84 R.P.R. (4th) 305.
- [24] The defendants in *Aquiline Resources* sought a dismissal of the action for want of prosecution. Although he found that the defendants had established the basic requirements for want of prosecution, Mr. Justice Smith dismissed their application because the plaintiffs would be exposed to liability in the defendants' counterclaims which would require them to rely on much of the same evidence they would have to produce in their own claims. Dismissing the action would therefore have been unfair to the plaintiffs.
- [25] The defendants asked that Smith J. reconsider on the basis that they would have abandoned their counterclaims had they known those claims would stand in the way of the dismissal. In reaching his decision not to reopen the matter, Smith J. set out what he considered the "governing principle" from *Clayton v. British American Securities Ltd.* (1934), [1935] 1 D.L.R. 432 at 440-41, [1934] 3 W.W.R. 257 (B.C.C.A.):

It is, I think, a salutary rule to leave unfettered discretion to the trial Judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur. If, e.g., a document should be discovered after pronouncement of judgment - but before entry showing that the judgment was wrong and the trial Judge was convinced of its authenticity no lack of diligence by solicitor in producing it earlier should serve to perpetuate an injustice. The prudent course is to permit the trial Judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur. [Emphasis added.]

- [26] The issue of the counterclaims had been raised by the plaintiffs during the dismissal application. Mr. Justice Smith held that it was not open to the defendants to take an alternate position in response to his judgment and declined to reconsider.
- [27] The legal position on reconsideration was also reviewed and summarized by Bennett J. in *Cheema* at para. 25, as follows:

A trial judge may properly elect to exercise his or her unfettered discretion to re-open a case before a judgment has been entered and where no fresh evidence application is made, where material evidence was overlooked or misconstrued, there was a misapplication of the law, or to

clarify ambiguous language. Additionally, non-entered judgments have been re-opened where there has been a change in circumstances such that the original order would not have been made had those circumstances been present. However, where the applicant is merely advancing an alternative argument that could have been made at the time of the original trial, this is not a proper basis upon which to reopen. The underlying rationale of the judge's unfettered discretion to re-open is to prevent a miscarriage of justice.

[28] The question then before me is whether it would be a miscarriage of justice to decline to reopen or vary the May 7 Order.

[29] I accept Smith J.'s summary of this often used phrase. A "miscarriage of justice" has been defined as:

- "[a] grossly unfair outcome in a judicial proceeding": Black's Law Dictionary, 8th ed., s.v. "miscarriage of justice", cited with approval in Aquiline Resources;
- more than "unfairness as viewed by the party who perceives himself the victim of an unfair process": *Lin v. Tang* (1997), 147 D.L.R. (4th) 577 at para. 61, 37 B.C.L.R. (3d) 325 (C.A.);
- "more than just a finding that a different result might have occurred. It involves a finding that, absent the reopening of the matter and the reversal of the original determination, a fraud would be perpetrated or the giving of perjured evidence or the deliberate misleading of the Court would be countenanced: 1307347 Ontario Inc. v. 1243058 Ontario Inc., (26 January, 2001), Doc. 00-CV-197213CM, [2001] O.J. No. 257 (Ont. S.C.J.).

[30] In addition, the Court in *Lin* observed, at para. 64, that such a miscarriage is almost always procedural: "The blemish must be such as to make the judicial procedure not a judicial procedure at all".

[31] Finally, in *Parker Cove*, the plaintiffs sought a declaration that the defendants were unlawfully occupying subleased premises and requiring them to immediately vacate. The Court granted the defendants relief from forfeiture pursuant to the Law and Equity Act for a specified period of time.

[32] The parties were unable to agree on the form of the order and, when, as a result, the matter returned in front of Barrow J., they invited him to reconsider his decision on the basis that counsel had not had an opportunity to address the issue of whether the Law and Equity Act applied to the Reserve Land in question.

[33] Mr. Justice Barrow had not given the plaintiff an opportunity to address the question before issuing his reasons and found that he should have. He was therefore satisfied that it was appropriate to reopen the proceedings for purposes of receiving submissions on the issue raised. After considering the matter, Barrow J. held that his earlier order stood.

## DISCUSSION

- [34] I accept the proposition in Scarr that Supplemental Reasons should not be used as an opportunity for a trial judge to defend his or her judgment pending appeal. I also accept that Banyay, Metalclad, Aquiline Resources, Cheema and Parker Cove are authority permitting a trial judge to amend an un-entered order and that Banyay and Metalclad decide that it is sometimes appropriate for a trial judge to issue Supplemental Reasons with respect to a judgment which is under appeal.
- [35] I have nevertheless concluded that no reconsideration is warranted on the facts of this case.
- [36] The parties appeared before me at a JSC at which they resolved the issues between them. Both parties confirm that they thought they had reached agreement at that time. It was left to counsel to draft Final Minutes which reflected the agreement.
- [37] The parties came before me at the May 7 Hearing with competing applications: the plaintiff sought an order that no agreement had been achieved and the defendant sought the opposite order and argued to settle the terms of the order. I found for the defendant and listened to submissions from both sides before settling the terms of the order. Counsel had ample opportunity to make submissions as Court was convened until 5:45 pm.
- [38] At the end of the May 7 Hearing, I declared that the parties had reached agreement on all essential terms at the JSC. Only two minor outstanding issues had not been settled. These related to access, and I note that the wording of these terms appears now to be agreed as neither counsel submitted alternate wording to me on these paragraphs. As a result of the May 7 Hearing, I made certain other orders to ensure that the Final Minutes reflected the agreement between the parties.
- [39] Both parties now ask that I settle not only the terms amended on May 7, but also that I adjust or vary the order in other ways. The plaintiff says I should do so "to ensure inadvertent drafting and slips do not unfairly upset the settlement."
- [40] This is not a case like Banyay in which the Court misconceived the evidence and determined that it was appropriate to issue Supplemental Reasons to correct that error. I do not understand the plaintiff to argue that I have misconceived the evidence before me.
- [41] This is not a case like United Mexican States in which a gap in submissions resulted in an ineffective order. In that case, the relevant provision of the Tribunal's governing statute came before the Court for the first time on reconsideration. The Court's order intended to remit certain matters to the Tribunal and the order needed to be amended to permit the Tribunal to do so. The parties in the present case had the opportunity to make submissions regarding whether an agreement had been reached at the JSC and the terms of that agreement. This is evidenced by my May 7 Reasons.
- [42] Therefore unlike in Parker Cove, my original decision was not grounded on provisions of law on which the parties had not had an opportunity to make submissions.

- [43] The plaintiff does not suggest there was a procedural defect; he does not argue that there has been a change in circumstances.
- [44] To put it another way, the plaintiff does not say that I made an error which has come to light because of evidence not before me at the May 7 Hearing, but that the decision I made, on the evidence before me, was incorrect.
- [45] The plaintiff asks me to find that I was in error and reverse myself. It would be inappropriate for me to do so.
- [46] It follows that I am not persuaded that, absent a reversal, a fraud will be perpetrated on the Court or that a grossly unfair outcome will occur. To borrow the language of Mr. Justice Smith in *Aquiline Resources* at para. 18:

Indeed, a reversal of my own decision at this point would come closer to meeting the definition of miscarriage of justice, because it would turn the judicial process into one in which the result is subject to bargaining between the parties and the Court.

## CONCLUSION

- [47] The parties reached agreement on all material terms on January 13, 2010. The minor outstanding matters were settled on May 7, 2010. The Final Minutes must reflect that agreement. Amendments which have otherwise been agreed to by the parties may be appropriate. This Court cannot and will not impose other wording on the parties.
- [48] The application for reconsideration is dismissed. The parties will each bear their own costs.

## Order

- [49] I have reviewed the parties' submissions on wording for the Final Minutes. Attached as Schedule "A" to these Supplemental Reasons for Judgment is the wording I have selected.
- [50] I note again that the Final Minutes reflect an agreement between the parties. It is therefore open to the parties to agree to make changes in the Final Minutes [my emphasis].
- [51] Absent agreement to the contrary, and for the foregoing reasons, I order that:
- paragraphs 2, 11, 12, 13, 16b, 16j, 30, 38a, 38m, 42 and 52.1 of the Final Minutes be worded as they are in Schedule "A" of these reasons; and
  - in all other respects, including but not limited to headings, the preamble and the signature line, the Final Minutes be worded as are the May 7 Minutes, that is, the minutes as drafted by counsel for the defendant and which were before me at the May 7 Hearing.
- [52] I direct Mr. Dubas to prepare the Final Minutes and draft order and provide them to Mr. Thomas within seven days of these Reasons.
- [53] I hope to have the parties avoid the cost of appearing before the Registrar.

"L.D. Russell J."

Schedule "A"

Paragraph 2

The following are the debts of the parties for which they could claim contribution from the other as a result of their marriage:

- a. Any unpaid balance of the landline phone account, strata fees and/or assessments, property taxes, home insurance, hydro, gas charges, civic utilities all of which are related to the Matrimonial Home, whether or not they are held in the name of both or either party (hereinafter the "Unpaid Home Debts").
- b. The CIBC mortgage of the parties of the Matrimonial Home with a balance of approximately \$109,000.00 as of January 12, 2010 (hereinafter the "CIBC Mortgage");
- c. The BMO joint MasterCard of the parties with a balance of approximately \$2,311.05 as of April 5, 2009 (hereinafter the "BMO MasterCard");

### Paragraph 11

Within 60 days from the entry of the final order regarding the division of assets in the form attached as Schedule "A" hereto, the Defendant will pay the Plaintiff \$98,000.00 for his interest in the Matrimonial Home, and she will pay him a further \$2,000.00 to address the order of costs, inclusive of all taxes and disbursements for the interim appearance in front of Master Baker in November and December 2009.

### Paragraph 12

As part of the transaction described in paragraph 11 hereto, the Plaintiff will transfer his interest in the Matrimonial Home to the Defendant, and the Defendant will assume full responsibility for all of the debts outlined in paragraph 2 of these Minutes of Settlement, such that the Plaintiff is removed from all responsibility for these debts and obligations, and the Plaintiff's name shall be removed from all of these loans, debts and/or accounts, as the case may be, as part of this refinancing transaction with respect to the Matrimonial Home, and for greater certainty, the Defendant will be responsible for all debts outlined in paragraph 2 of these Minutes of Settlement free and clear from any claim for contribution by the Plaintiff, and these debts shall include the CIBC Mortgage, the BMO MasterCard, and the Unpaid Home Debts.

### Paragraph 13

The \$100,000.00 that the Plaintiff is receiving with respect to the issues of Court costs and for his interest in the Matrimonial Home as outlined in paragraph 11 hereto, will be paid to the Plaintiff by the Defendant on the basis that he will receive this money free of any tax liability. And, upon receiving the said \$100,000.00, he shall be entitled to retain same free and clear from any claim of the Defendant. The Plaintiff hereby confirms that the Former Matrimonial Home has been the

parties' principal residence since same was purchased on March 5, 2003 for the purposes of the Income Tax Act (Canada) and neither party has designated any other property as principal residence since that date.

## Paragraph 16b

13" Silver Toshiba TV (DVD wall mount, and any other accessories pertaining to the TV such as the remote and wiring).

## Paragraph 16j

Black 46" LCD Samsung TV (tv wall mount and any other accessories pertaining to the TV such as the remote, HDMI wiring, Monster Pack power bar, and any other additional wiring for the TV).

## Paragraph 30

To the extent that either party herein believes an expense is a proper special expense for the Child, and this is not dealt with by paragraph 27 hereto, either party must obtain the agreement of the other party, before the expense is incurred, and if the parties cannot agree that a special expense should be incurred or that it is reasonable or necessary, then there is liberty to apply to the Supreme Court of British Columbia on this issue.

## Paragraph 38a

Telephone access to the Child each day when the Child is not with the Plaintiff or in an extracurricular activity that the Plaintiff is not attending for at least 10 minutes at 6:00 p.m., and if the Defendant is going out of town with the Child, she must provide the Plaintiff with 24-hours advanced notice of this and an applicable alternate telephone number where the Child can be reached, and she shall initiate the call to the Plaintiff in these circumstances.

## Paragraph 38m

Subsequent to the summer of 2010, the Plaintiff will have the Child with him for one-half of the time on a week-on/week-off rotation with exchanges to occur on Friday at 10:00 a.m., with the first week of such access to be enjoyed by the party having the weekend access as of, or closest to the end of the school year. The parties may vary the week-on/week-off summer access schedule where the said schedule will not result in each party obtaining the sought after equal summer access, but where such change is made, the resulting schedule will still result in an equal division of time with the Child, and where the parties cannot agree, there is liberty to apply.

**Paragraph 42**

Notwithstanding paragraph 38 hereto, the Defendant will have telephone access to the Child each day when the Child is not with the Defendant or in an extracurricular activity that the Defendant is not attending for at least 10 minutes at 6:00 p.m., and if the Plaintiff is going out of town with the Child, he must provide the Defendant with 24-hours advanced notice of this and an applicable alternate telephone number where the Child can be reached, and he shall initiate the call to the Defendant in these circumstances.

**Paragraph 52.1**

Notwithstanding paragraph 52 of these Minutes of Settlement, no term of these Minutes of Settlement shall be interpreted or construed as affecting or releasing in any way any Order of Costs made by the Honourable Madam Justice Russell on May 7, 2010.

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Prepared on 27 October 2026 · Esheria