

CANADA / JUDGMENT

Sievert, et al v. Napier, et al

2006 BCSC 613

COURT

Supreme Court of British Columbia

DECIDED

19 April 2006

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2006 BCSC 613 Sievert et al v. Napier et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sievert, et al v. Napier, et al,

2006 BCSC 613

Date: 20060419

Docket: L040080

Registry: Vancouver

Between:

Brie Sievert and Kaylie Hutchinson

Plaintiffs

And

Evangeline Helen Napier, Executrix of the Estate of

Philip Brian Hutchinson, also known as Philip B. Hutchinson,

also known as Philip Hutchinson, Deceased and the said

Evangeline Helen Napier, also known as Evangeline Napier

Defendants

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for plaintiff

P.A. Spencer and K. Wedel

Counsel for defendants

D.B. Kirkham, Q.C.

Date and Place of Hearing:

April 7, 2006

Vancouver, B.C.

- [1] The plaintiffs apply pursuant to s. 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253, and the inherent jurisdiction of the court, for a declaration as to the terms of a settlement they claim they reached with the defendant, Evangeline Helen Napier (in her personal capacity and as executrix of the estate of the plaintiffs' father). The defendants ("Ms. Napier") agree that the parties reached a settlement. However, Ms. Napier takes a different view of the terms of the settlement. Both parties agree that the court has the jurisdiction to determine the terms of the settlement.

I. BACKGROUND

- [2] The plaintiffs, Brie Sievert ("Ms. Sievert"), and Kaylie Hutchinson ("Ms. Hutchinson"), are the daughters of the deceased, Philip Brian Hutchinson ("Mr. Hutchinson"). Mr. Hutchinson and the mother of the plaintiffs were divorced. He had a common law relationship with Ms. Napier at the time he died.
- [3] The plaintiffs commenced an action against Ms. Napier pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490, in which they claim that Mr. Hutchinson had not made adequate provision in his will for their proper maintenance and support. Initially, they were represented by a solicitor who soon transferred conduct of the file to another lawyer, Mr. John MacLeod ("Mr. MacLeod"). Ms. Napier was then represented by lawyer, Trevor Todd ("Mr. Todd").
- [4] Ultimately, examinations for discovery of the plaintiffs were set for August 18, 2004. However, the examinations did not proceed as settlement negotiations instead took place between Mr. Todd and Mr. MacLeod. The parties themselves were not present during the settlement negotiations.
- [5] At the time of the settlement negotiations on August 18, 2004, it was known that Ms. Sievert and Ms. Hutchinson claimed to have been physically and sexually abused by Mr. Hutchinson, although such claims were not contained in the action to vary the will.
- [6] Unfortunately, Mr. MacLeod became ill and died a few months later. That led to certain communication difficulties and, of course, the plaintiffs had to obtain new counsel. However, before Mr. MacLeod's health made him unable to continue with the file, there was an exchange of correspondence between him and Mr. Todd to confirm the terms of the

settlement and a subsequent amendment. In an affidavit filed in support of the position of Ms. Napier, Mr. Todd also provided a copy of the notes that he took during the course of the settlement negotiations with Mr. MacLeod. The basic terms of the settlement were contained in a letter written by Mr. Todd to Mr. MacLeod on August 19, 2004:

Further to our attendance at the examination for discovery of your clients on August 18, 2004, I confirm that as a result of settlement negotiations, a settlement was concluded on the following basis:

1. That the debts of the estate are to be paid off the top, and that my client be credited back 50% of the debts that she has paid, including the debts referred to on the disclosure document, as well as the probate fees. The remaining debts which have not been paid, I understand to be a line of credit, a CIBC Visa, and the property taxes for the years 2003 and 2004.

I have asked my client to obtain updated statements and proof of payment of the various debts, which will be provided and brought into the necessary accounting to be conducted.

2. That the only asset of the estate, namely the property situate at 2327 Hazellynn Place, North Vancouver, B.C., shall be appraised forthwith by Cunningham and Rivard Appraisers, and your clients and mine will split the cost of obtaining the appraisal. I have written to the appraisers this day to retain their services.
3. Once the appraisal is obtained, my client agrees to pay to your clients, in full satisfaction of their claims in this action, 50% of the appraised value, subject to the accounting for the debts and prepaid expenses.
4. My client shall have 90 days from the date of the appraisal to arrange satisfactory financing to buy out your clients' 50% interest in the property (again having taking into account the debt accounting as aforesaid), or failing the completion of same, the house shall be forthwith listed for sale at fair market value.
5. That you will release the Certificate of Pending Litigation filed against the property at the appropriate time, in order to allow the refinance. Undertakings as may be required will be negotiated at this time.
6. That each party bear their own costs to this litigation.
7. That a Consent Dismissal Order, without costs, be executed and the action dismissed.
8. That there be Mutual Releases, and that the Release of all Claims to be signed by your clients will, inter alia, include a specific provision that no further actions of any nature, including physical and/or sexual assault will be brought by your clients against my client and/or the Estate of the [sic] Phillip Hutchinson, deceased.
9. My client will abandon her claim for executor fees.

I trust that all of the above accurately reflects the terms of our settlement.

[7] Mr. Anthony Rivard of Cunningham and Rivard Appraisals was quickly engaged by Mr. Todd to appraise the residence at 2327 Hazellynn Place, North Vancouver, which the parties had agreed was the only asset of the estate. He appraised the value of the property at \$570,000 as at September 2, 2004. Mr. Rivard, however, noted that there was an apparent problem with flooding in the crawl space beneath the home which he had to either factor into its value or ignore. The parties, through their counsel, agreed that he would not take into account the cost of any remedial work and that estimates for that work would be obtained separately. In that regard, Mr. Todd again wrote to Mr. MacLeod on September 2, 2004, as follows:

My client has raised some concerns re the settlement agreement that need to be ironed out.

The appraiser was to be there at the house today to conduct an inspection. Presumably the appraisal will not take long to prepare.

My client has two concerns about obtaining the two estimates to repair the flooding problem, namely:

- 1) there may be a cost to obtaining the estimates (and there may not be as well), and if there is a cost, then she wants the cost to be equally split between the parties;
- 2) there is also a timing problem in that the estimates will not be done until after the appraisal. She wants the 90 days to start running from not the date of the appraisal but instead from when the two estimates are obtained (which presumably will not take a long time to obtain, but it could take longer than it did to obtain the appraisal)

Since we need the repair estimates before we can begin to agree on what the appropriate amount should be to take off from the appraisal, my client's concerns and suggestions to vary the agreement make sense to me.

Please let me know your position re the above concerns. If we are unable to agree, then I will have to ask the appraiser to delay the final preparation of his report until we can reach agreement on the estimate concerns.

Mr. MacLeod wrote "agreed" opposite each of concerns 1 and 2 in the letter, signed it, and returned a copy to Mr. Hutchinson. The parties agree that the settlement agreement was amended accordingly.

[8] By October 18, 2004, the two repair estimates had been obtained by Mr. Todd. They were \$57,637.69 and \$79,907.60 respectively. On behalf of Ms. Napier, Mr. Todd wrote to Mr. MacLeod and proposed that they average the two quotes for a deduction from the value of the home of \$68,772. With that correspondence, in addition to the two quotations, he also enclosed a proposed distribution statement which valued the home accordingly, listed all of the liabilities of the estate, and proposed a distribution of it in accordance with the assessed value of the home less the average of the two estimated cost of repairs of \$235,212.96 to each of Ms. Napier and the plaintiffs.

[9] Mr. MacLeod then replied to Mr. Todd on October 22, 2004, as follows:

My belles would like

Rob @ All Star Flood & Restoration to have a chance at quoting on the restoration job.

Your lady appears to want the "full meal deal" since she plans to keep the property.

Can you give me Ms. Napier's phone # so Rob can tee up a visit to the house.

If no you & I will have to co-ordinate times which is time intensive and unnecessary.

[10] Evidently, the idea of deducting from the value of the home as much as \$68,772 did not sit well with Ms. Hutchinson who was instructing Mr. MacLeod on behalf of the plaintiffs. It was clearly her view that the drainage problems of the home were probably minor (such as a sump pump that had not been kept in proper repair) and she wished to attend at the home personally together with a repair person of her choosing. Ms. Napier, for reasons not explained, would not permit Ms. Hutchinson to attend at the home but did agree to the attendance of a contractor provided that sworn proof was provided of the independence of this individual. At that point, the combination of the illness of Mr. MacLeod and his inability to continue acting for the plaintiffs, combined with the unfortunate attitudes of both parties, led to further delay.

[11] Further exchanges included a direct communication from Ms. Hutchinson to Mr. Todd on November 8, 2004:

As a person that is being asked to pay a portion of these so called damages that have occurred during Mrs. Napier's stay, I find it hard to believe that you would find it unnecessary for both parties to not be present. Mrs. Napier can set up the dates and times but I would like to be present.

Have your client contact Scott from Head Water Management [].

[12] Mr. Todd replied to her on November 9, 2004:

Sorry but you will not be present.

We initially agreed on two estimates and now you want 4, and we are prepared to oblige, but my client does not want you present and I see no need for you to be there, and this is the first suggestion that you would be. Mr. MacLeod made no mention of such.

In fact we have already given you three estimates in that there was one disclosed in the court proceedings relating to a valuation of the house.

Your comments about "so called damages [sic]" are out of line and offensive. There is clearly a flooding problem.

Were it not for Mr. MacLeod's illness we would not be communicating.

I suggest that under the circumstances that perhaps you should take the matter back to Mr. Cameron to get it finalized, as I would prefer to deal with counsel.

[13] By mid-November 2004, the plaintiffs had contacted their present counsel with a request that that firm represent them. Mr. Spencer, their present lawyer, wrote to Mr. Todd on November 18, 2004, to say that after obtaining the file from Mr. MacLeod and meeting with the plaintiffs and obtaining instructions, his firm would be in further contact. That further contact apparently did not take place until April 29, 2005, at which time a notice of change of solicitor was provided to Mr. Todd. Mr. Spencer noted in his April correspondence that there were aspects of the case which troubled him and he indicated that he would appreciate the opportunity of speaking with Mr. Todd at his earliest convenience. However, Mr. Spencer appears not to have pursued that opportunity until some months later so that, by July 2005, he had apparently communicated to Mr. Todd that the plaintiffs were resiling from the fact that a settlement had been reached and particularly were taking the position that they had not compromised their right to continue with actions claiming physical and sexual abuse of them by their late father. However, by October 2005, the plaintiffs had returned to the position that there was a settlement. Nonetheless, they interpreted the consequences of the settlement other than did Ms. Napier.

II. DISCUSSION

[14] In connection with the settlement, the plaintiffs take two positions at present: The first is that because more than 90 days have elapsed since Ms. Napier obtained the two appraisals to repair the water damage, the home must be forthwith listed for sale for its fair market value, sold, and the proceeds divided equally after the payment of contemplated estate expenses and costs. This is because, they say, Ms. Napier had two appraisals and, had she wished to avail herself of the value of the home determined in the appraisal of September 2004, she should have tendered the amount Ms. Napier claimed was due to them within the 90 days after obtaining the two repair estimates.

[15] In the alternative, the plaintiffs wish to have a current appraisal of the home and "two independent estimates" of the cost to repair the water damage, if any.

[16] Ms. Napier, on the other hand, says that the settlement contemplated that the appraisal to be relied upon was that obtained in September 2004. Further, argues Ms. Napier, she obtained two estimates of the cost to repair the water damage as required by the terms of settlement but the plaintiffs were unwilling to accept them, requesting an opportunity to obtain two estimates by their own nominees. Thus, argues Ms. Napier, the 90 days in which she had to complete was extended as a corollary to her having agreed to the plaintiffs' request to obtain their own estimates. The fact that the first of those estimates was not obtained until March 30, 2006, (for this I rely on the submission of plaintiffs' counsel, there is no affidavit evidence to this effect) was not her fault, argues Ms. Napier, but rather the delays were caused solely by the plaintiffs or their counsel failing to pursue the opportunity offered to them to obtain their own estimates. The plaintiffs counter this by suggesting that it was not until

immediately before this application that the defendant provided the accounting which she was obliged to provide under the terms of the settlement.

- [17] Undoubtedly, when the parties entered into the settlement on August 18, 2004, they contemplated that the events necessary to conclude it would proceed quickly. For that reason, it was agreed that the appraisal would be done "forthwith". Essentially it was done very quickly. The appraiser raised the problem of the degree to which the value of the home would be affected by the water problem in the crawl space. To deal with that, the parties then amended their agreement to provide that two appraisals would be obtained. They did not specifically agree as to whether the lowest or an average of the appraisals would be used. Probably no one contemplated that the estimates would be as high as they were. Certainly, it is evident from the reaction of Ms. Hutchinson that she was taken aback by the size of the deduction from the estimated value that Ms. Napier was proposing. For that reason she, sensibly, sought to have two additional appraisals carried out. As her then lawyer, Mr. MacLeod, noted in his correspondence with Mr. Todd, the plaintiffs were of the view that Ms. Napier was asking for the "full meal deal" or a much more expensive solution than was actually necessary to address the problem. Thus, through Mr. MacLeod, and subsequently in correspondence from Ms. Hutchinson, the plaintiffs put forward the names of two additional firms that they wished to have attend at the house and give estimates of the cost of the necessary repairs. That was agreed to. Effectively, then, the settlement agreement was further amended to allow for four appraisals instead of the original two.
- [18] It was recognized from the correspondence between the parties that Ms. Napier would need 90 days from the time that the amount to be paid to the plaintiffs was determined in which to obtain financing so that she could provide the plaintiffs with the settlement amount. It cannot be seriously argued that she would not still need 90 days (or at least still be entitled to 90 days) from the time the repair costs are agreed upon after the preparation of the third and fourth estimates required by the plaintiffs. Undoubtedly, the sense of the words in para. 4 of Mr. Todd's letter of August 19, 2004, dealing with the 90 day time period, was to provide for the house to be listed for sale at fair market value if, after the 90 days, the defendant was unable to arrange her financing. In the circumstances that transpired after she agreed to the additional appraisals, she did not apparently even pursue the financing because the final settlement amount had not yet been determined. The sole reason this did not take place was because of the delays of the plaintiffs. It can in no way be laid at the feet of Ms. Napier. Thus, I agree with the submission of Mr. Kirkham that the plaintiffs cannot now come to the court trying to get an advantage by reason of their own delay. It may well be that the value of the home has increased in the last year and a half (there is no appraisal evidence presented to that effect, of course) but then, so too may costs of borrowing for Ms. Napier, and potentially the costs of repair (although given the one estimate obtained by the plaintiffs on March 30, 2006 which was not actually in evidence, that may be in some doubt).

- [19] No issue was taken with the appraisal that was obtained in September 2004. Obviously, the plaintiffs were content with that value. What they were not content with was the amount that Ms. Napier proposed to be deducted from the appraised value of the home to cover the costs of repair. They were offered the opportunity to obtain estimates by Ms. Napier agreeing to there being four estimates, not two as originally agreed. To this point, the plaintiffs appear to have only obtained one additional estimate.

III. CONCLUSION

- [20] In my view, the plaintiffs are bound by the terms of their settlement agreement which is that the sole asset in the estate in which they are entitled to a half interest is valued at \$570,000 less an amount to repair the water damage. Ms. Napier has put forward her two repair estimates (in my view she is no more entitled to have them "updated" than are the plaintiffs entitled to have an updated appraisal). Now the plaintiffs must put forward their two appraisals (if they wish to have more than the one they appear to have already obtained).
- [21] Ms. Napier shall have 90 days to obtain financing from the date that the last of the plaintiffs' two estimates are obtained (not from the date when the parties agree on the amount). In that way, the intent of the wording of the original amending agreement of September 2, 2004, will be honoured.
- [22] I add this: the settlement agreement also includes a compromise of the plaintiffs' claims for physical and sexual abuse.
- [23] There is liberty to apply with respect to the question of the value of the repairs if the parties cannot agree upon an amount. In that regard, however, I take from the exchange of correspondence with respect to the request of the plaintiffs to be able to obtain two additional appraisals, that there was a recognition on the part of Ms. Napier that another qualified individual might well provide an estimate that was lower than the two that she had obtained. The sense of what the parties appear to have agreed on is that the value of the only asset of the estate, the house, would be reduced by an amount to effect reasonable and necessary repairs. One would expect that would be the lowest price for which those repairs can properly be done.
- [24] Ms. Napier is entitled to her costs of this application on Scale 3.

"T.J. Melnick, J."

The Honourable Mr. Justice T.J. Melnick

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