

CANADA / JUDGMENT

Smith v. Kolisnyk

2022 BCSC 2098

COURT

Supreme Court of British Columbia

DECIDED

1 December 2022

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2022 BCSC 2098 Smith v. Kolisnyk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith v. Kolisnyk,

2022 BCSC 2098

Date: 20221201

Docket: E17324

Registry: Chilliwack

Between:

Tracy Lynn Smith

Claimant

And

James Edward Kolisnyk

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Claimant:

J. Steiner

The Respondent, appearing in person:

J. Kolisynk

Place and Date of Hearing:

Chilliwack, B.C.

October 24, 2022

Place and Date of Judgment:

Chilliwack, B.C.

December 1, 2022

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Introduction

- [1] These parties in this unfortunately high conflict family law proceeding appeared before me on October 24, 2022 (the "Hearing") initially on an application of the claimant mother to address some outstanding issues. The respondent father claimed that it was his understanding that a notice of application he had filed on August 15, 2022 was also being heard at the same time. To accommodate the parties and to avoid the cost of the parties returning to chambers, I agreed to hear the respondent's application as well.
- [2] The parties entered into a separation agreement on November 23, 2018, which set out parenting arrangements for their three children, support, and division of property (the "Separation Agreement").

- [3] The claimant seeks the following in her application filed on August 10, 2022:
1. A declaration that the claimant has abided by section 7, paragraph 3 of the Separation Agreement, or alternatively, that the Separation Agreement be varied such that section 7, paragraph 3 is deleted.
 2. The name of the claimant in the style of cause of this Action be changed from Tracy Lynn Kolisynk to Tracy Lynn Smith.
 3. There be judgment in favour of the claimant in the amount of \$537.54 for the pandora bracelet.
 4. There be judgment in favour of the claimant in the amount of \$1,570 for damages to the native bracelet.
- [4] The respondent does not oppose the changing of the claimant's name and I so order the change.
- [5] The respondent seeks the following in his application filed on August 15, 2022:
1. The claimant, and/or her counsel, pay fines in the amount of \$10,000 each for breach of a court order, and pay a fine in the amount of \$14,819.34 for pain and suffering.
 2. The claimant pay for loss of wages incurred by the respondent for stopping the process of fixing his ankle problem so he can work.
 3. There be judgment against the claimant for one half of the cost of protecting the family residence in the amount of \$44,242.26.
- [6] The respondent acted on his own behalf at the Hearing. It appears he has done so for the majority of this family law proceeding.
- [7] I note that there is also a proceeding in the Provincial Court dealing with parenting issues relating to the parties' three children and child support. There was a ten-day trial in Provincial Court in May, September, and October 2021, with reasons issued by Judge Brown on December 9 and 17, 2021.

Background Facts

- [8] The parties were married on August 19, 2000 and separated on January 20, 2017. They have three children.
- [9] The respondent signed the Separation Agreement and Waiver of Independent Legal Advice on June 4, 2018 and the claimant signed the Separation Agreement on November 23, 2018. The current counsel for the claimant provided legal advice to the claimant on the nature and effect of the Separation Agreement. On August 17, 2020, the Separation Agreement was filed in the Chilliwack registry of the Supreme Court.

- [10] A property located at 51521 Chilliwack Lake Road was described in the Separation Agreement as the family residence.
- [11] On September 28, 2020, the claimant filed a notice of application to enforce the terms of the Separation Agreement. Justice Riley heard the application on November 30 and December 4, 2020.
- [12] On January 21, 2021, Riley J. made an interim order, including an order that certain personal effects in the possession of the respondent be returned to the claimant (the "Riley Order"), including the native bracelet and pandora bracelet.
- [13] The Riley Order also ordered that the family residence be sold, with the claimant having sole conduct of the sale. There were orders made respecting the compensation payment the respondent had to make to the claimant. A further order made was:
6. The Claimant's request for approval to remove the Respondent from her health insurance is not granted.
- [14] Certain other relief claimed by the claimant was adjourned generally. The compensation payment of \$220,000 was paid to the claimant on February 11, 2021.
- [15] The claimant says that the pandora bracelet was not returned and the native bracelet was returned badly damaged.
- [16] The adjourned relief was heard by Justice Walker on July 6 and 9, 2021 and his order included judgment in favour of the claimant against the respondent in the sum of \$29,800 in accordance with the respondent's outstanding obligations under the Separation Agreement (the "Walker Order"). In addition, there was the following order made:
4. A referral is made to the Registrar to conduct an inquiry and assessment into the value of the Pandora bracelet and to provide a recommendation to the court pursuant to Rule 18-1(3).
- [17] The divorce order was granted on March 17, 2022. On or about March 23, 2022, the claimant provided the divorce order to J&D Benefits Inc., the company responsible for administering her benefits plan, to update them on her marital status. She was advised that the respondent was no longer eligible for benefits as he no longer met the definition of "spouse".
- [18] On that day, the respondent was having dental work done which had been pre-approved by the insurer. As a result of the respondent's removal from the claimant's benefits, the dental work was not covered by the insurer and the respondent has been receiving invoices from Smile Dentistry demanding he pay the sum of \$14,819.34. I understand this sum would have been paid by the claimant's insurer.
- [19] On May 9, 2022, Liz Graham of J&D Benefits Inc. advised both parties that:
- Coverage for divorced spouse can be continued if the divorce settlement requires benefits to be continued, and there is not enough information in this document to confirm that.

- [20] The document being referenced was the Riley Order.
- [21] The hearing before the Registrar, as directed in the Walker Order, was set for August 4, 2022. The respondent says he did not know about this hearing. Counsel for the claimant advised that the appointment to appear before the Registrar was personally served on the respondent on July 7, 2022.
- [22] The hearing before the Registrar took place on August 4, 2022 before Master Nielsen, who made the determination that the pandora bracelet had a value of \$537.54 and made the following recommendation:
1. Pursuant to paragraph 4 of the Order, the court should order that the Respondent pay to the Claimant the sum of \$537.54 for the value of the Pandora Bracelet.

Issues

- [23] The application materials and submissions raise the following issues:
- 1) Should the health insurance benefits of the respondent be reinstated?
 - 2) Is the claimant or the claimant's counsel in breach of a court order, and if so, should any fine(s) be paid?
 - 3) Is the respondent entitled to any amount for pain and suffering or for loss of wages arising from the cancellation of the health benefits?
 - 4) Is the claimant entitled to judgment for the value of the pandora bracelet?
 - 5) Is the claimant entitled to judgment for the alleged damaged to the native bracelet?
 - 6) Is the respondent entitled to claim against the claimant 50 percent of the interest charges he incurred on the mortgages against the family residence?

Issue 1: Should the Health Insurance Benefits of the Respondent be Reinstated?

- [24] The Separation Agreement provides on page 13:
3. Tracy will maintain her medical, extended health and dental coverage through her employment for James for as long as it is available, for his benefit.
- [25] According to the evidence before me, the insurer is willing to continue the benefits, even after the parties are divorced, if the parties agree to having the benefits continue.
- [26] I note the wording of the clause in the Separation Agreement does not say that the health benefits would be provided only until the parties are divorced. It is clear that a divorce was a likely event at the time the Separation Agreement was written. The claimant has deposed that she assumed that when a divorce took place the respondent would no longer be her spouse and that he would be removed from her benefits plan. I note that is not what the Separation Agreement specified. If the claimant wanted to put a deadline on the provision of health benefits she could have done so. She did not. The only deadline is if the benefits are

no longer available to her.

- [27] J&D Benefits Inc. states that coverage for a divorced spouse can be continued if the divorce settlement requires the benefits be continued.
- [28] The Separation Agreement states that the health benefits continue and there is no agreement to end the benefits upon a divorce order being proclaimed.
- [29] I direct that the respondent be reinstated under the claimant's benefits plan for health, extended health, and dental insurance.
- [30] The claimant expressed that reinstating the respondent under the claimant's benefits could infringe on her privacy. She gave the examples that the address for contact was changed to the respondent's address and that some pre-approval letter was not received. She was able to get the address changed back to her address, but is concerned that this will continue. Claimant's counsel advised that recently the claimant was again informed that her address had been changed. Though concerning, this is an insufficient basis to deny the respondent the health benefits he clearly needs.
- [31] It is not clear to me why J&D Benefits Inc. would change the claimant's address to the respondent's address, as she is the plan member. I will leave it for the claimant, as the plan member, to advise J&D Benefits Inc. that her address should not be changed to the respondent's address as a result of the respondent being reinstated for coverage.
- [32] The Separation Agreement provided for this coverage to continue and the respondent should not have been removed as a result of the divorce order. As such, the reinstatement should apply retroactively to the date that the respondent was removed from coverage.

Issue 2: Is the Claimant or the Claimant's Counsel in Breach of a Court Order, and if so, Should Any Fine(s) be Paid?

- [33] This Court has inherent jurisdiction to punish a party for contempt of a court order. Rule 21-7(3) of the Supreme Court Family Rules [Rules] provides for punishment for contempt by committal to jail, a fine, or both: *L.G. v. R.G.*, 2012 BCSC 1365 at paras. 281, 285.
- [34] In order to establish civil contempt for breach of a court order, the respondent must show that: (1) the order was clear and unequivocal regarding what should or should not be done; (2) the claimant had actual notice of the order; and (3) the breach was intentional: *Carey v. Laiken*, 2015 SCC 17 at paras. 33-35. The facts supporting the breach must be proven beyond a reasonable doubt: *L.G. v. R.G.*, 2012 BCSC 1365 at para. 283.
- [35] The respondent's position is that the claimant or her counsel maliciously arranged for the respondent to be removed from the claimant's health coverage when he was in the process of having dental work performed, for which he had received pre-approval from the benefits company.

- [36] Justice Riley had refused the claimant's request to remove the respondent from her health insurance on January 21, 2021. As such, the respondent argues that the acts taken to remove him from this coverage is in breach of the Riley Order.
- [37] The claimant's position is that the benefits company decided to remove the respondent on the basis that once the parties were divorced the respondent did not come within the definition of a spouse. Although it is clear that the claimant is the one that provided the divorce order to J&D Benefits Inc., she did not have him removed from the coverage. The respondent was removed as a result of the decision of J&D Benefits Inc. that the respondent no longer came within the definition of spouse and their view that the divorce settlement was not clear that the coverage was to continue.
- [38] I find that the claimant did not breach the Riley Order. As such, the contempt analysis is not required and there is no reason for a fine.
- [39] There is absolutely no merit in seeking a fine against counsel for the claimant. I also note that the respondent accused the counsel of "lying" in his submissions. I am going to warn the respondent that "Unsubstantiated attacks on the professional integrity of a lawyer are worthy of a court's rebuke. Such allegations have been found to merit special costs, even where the party is self-represented and indigent": *Allart Estate v. Allart*, 2016 BCSC 768 at para. 37. The respondent should be careful in the future about making allegations of lying against counsel, or other such attacks, unless supported by convincing evidence.
- [40] I do not find that the claimant or her counsel were in breach of the Riley Order. The application of the respondent for fines to be paid by the claimant or her counsel is dismissed.

Issue 3: Is the Respondent Entitled to Any Amount for Pain and Suffering or for Loss of Wages Arising From the Cancellation of the Health Benefits?

- [41] Although it is not clear in the notice of application of the respondent, I believe he is claiming that the claimant has breached the Separation Agreement, so the respondent is making a claim for breach of contract.
- [42] On the evidence before me, I am not prepared to find that the claimant has breached the Separation Agreement. As such, the claim for damages for loss of wages or pain and suffering arising from this alleged breach cannot be maintained.

Issue 4: Is the Claimant Entitled to Judgment for the Value of the Pandora Bracelet?

- [43] The position of the claimant is that the recommendation of Master Neilson should be accepted and an order made that the respondent pay for the value of the Pandora bracelet in the amount of \$537.34.

- [44] The position of the respondent is that he did not attend the hearing on August 4, 2022, since he was not served with notice of it. He says that when the safe was emptied there was no pandora bracelet in it and he does not have it.
- [45] I accept that the respondent was served with the appointment to appear before the Registrar. A self-represented litigant is obligated to read the documents served on him and it is the respondent's responsibility to ensure that he attend court appointments. Self-represented litigants do not have "some kind of special status" that allows them to ignore rules of procedure: 0927613 B.C. Ltd. v. 0941187 B.C. Ltd., 2015 BCCA 457 at para. 64.
- [46] However, the issue of the return of the pandora bracelet was canvassed before Riley J. He made the order that it be returned by the respondent to the claimant. I do not have the evidence that was before Riley J., but in light of that order, I am prepared to find that the respondent is responsible for paying the claimant for the value of the pandora bracelet. I accept Master Nielsen's determination of value.

Issue 5: Is the Claimant Entitled to Judgment for the Alleged Damage to the Native Bracelet?

- [47] The claimant explained that the issue of the damage to the native bracelet was before Walker J. but Walker J. did not address it in his order.
- [48] The claimant says when the native bracelet was returned to her by the respondent on February 2, 2021, it was significantly damaged in that the ends of the bracelet now "meet in the middle" and she can no longer slip it over her wrist. In support, the claimant produced a letter from Peter Lattimer of the Lattimer Gallery, dated March 7, 2021, confirming that the bracelet is misshapen and must be repaired. The cost of the repair and reshaping is \$1,500 plus GST. Also attached is a photo of the native bracelet showing its current condition.
- [49] The respondent denies causing any damage to the native bracelet. He explained that the native bracelet is made of a soft metal, and that it is intended to be open and closed over the skinny section of the wrist. He described this as normal wear, not damage.
- [50] I accept that the evidence supports that the native bracelet is damaged, but I am unable to find on the evidence before me that the respondent is responsible for this damage. As such, the respondent will not be ordered to pay for the costs of repair.

Issue 6: Is the Respondent Entitled to Claim Against the Claimant 50 Percent of the Interest Charges he Incurred on the Mortgages Against the Family Residence?

- [51] The respondent says the claimant should pay for 50 percent of the interest on two mortgages that were registered against the family residence. He claims he solely paid approximately \$88,000 in interest on these mortgages. It appears that the interest charges occurred both before and after the Separation Agreement was executed. He says that the claimant should contribute to these payments since, in paying the interest, he was protecting her investment in the family residence. He claims that this issue was not dealt with in the Separation Agreement.

[52] In respect to the claim for expenses the respondent incurred respecting the family residence, the relevant terms of the Separation Agreement are:

1. Background/Recitals

12 Tracy and James each intend this Agreement to be:

(b) a final settlement of

(ii) their respective rights in or to the property of the other and the property held by them jointly;

(v) all issues otherwise arising out of their marriage.

9. Family Residence

1. By January 31, 2019, James will pay Tracy the sum of \$220,000 as compensation for her interest in the Family Residence (the "Compensation Payment"). James will remain residing in the Family Residence and will have sole responsibility for all costs related to the Family Residence and any associated liability.

10. Debts

1. Tracy and James will be solely responsible for any debts in their names.

12. Releases

1. This Agreement is a full and final settlement of all issues between Tracy and James and all rights and obligations arising out of their relationship.

[53] In addition, the respondent signed a Waiver of Independent Legal Advice which provided:

I, James Kolisnyk, of the City of Chilliwack, in the Province of British Columbia, certify that:

1. I have read and understood the attached Agreement, and I am fully aware of each and every term therein. I have read and understand to my satisfaction my obligations and rights under the Agreement.

3. I acknowledge that Jessica S. Steiner has recommended that I seek independent legal advice with respect to the terms of the Agreement, and that I have been given an opportunity to seek such legal advice. Notwithstanding such recommendation, and said opportunity, I acknowledge and declare that:

(a) I wish to enter into this Agreement without independent legal advice;

(b) I understand that the terms of the Agreement and they correctly set out my wishes and intentions;

(c) I will not seek to challenge this Agreement at some later date on the basis of a complaint that I did not receive independent legal advice or that I did not understand the terms; and

(d) I agree to be bound by those terms.

4. I acknowledge and declare that I am executing this Agreement of my own volition and without fear, threats, compulsions or influence by Jessica S. Steiner or any other person.
- [54] The respondent, on one hand, wants to uphold the Separation Agreement in order to be entitled to the health benefits, and yet submits that the terms of the Separation Agreement should be disregarded on the basis that he did not read the Separation Agreement before he signed it. He submits that "everything in that Separation Agreement should be completely removed because absolutely nothing was followed."
- [55] It is important that parties that enter into separation agreements honour their provisions. Though separation agreements are of course different from commercial contracts, they are contracts nonetheless, and parties must take responsibility for the contracts they execute: *Miglin v. Miglin*, [2003] 1 S.C.R. 303 at para. 91, 2003 SCC 24.
- [56] In my view, the terms of the Separation Agreement clearly provided that the respondent was responsible for all costs and liabilities associated with the family residence. He further confirmed that he would be solely responsible for all debts in his name. The respondent certified that he read and understood the terms of the Separation Agreement. I see no basis to set aside the provisions of the Separation Agreement.
- [57] The respondent's demand that the claimant pay 50 percent of the interest incurred for mortgages registered against the family residence is dismissed.

Conclusions

- [58] I make the following orders:
1. The respondent shall be reinstated on the claimant's health, extended health, and dental benefits and the claimant will take the necessary steps to have this reinstatement take place. The reinstatement should apply retroactively to the date the respondent was removed from coverage.
 2. The claimant's name in the style of cause in this proceeding is changed from Tracy Lynn Kolisnyk to Tracy Lynn Smith.
 3. Judgment for the claimant against the respondent in the amount of \$537.54 for the pandora bracelet.
 4. The claimant's application for the respondent to pay for the cost of the repair to the native bracelet is dismissed.
 5. The respondent's application for the claimant or her counsel to pay fines is dismissed.
 6. The respondent's application for judgment for the claimant to pay 50 percent of the interest paid on the mortgages registered against the family residence is dismissed.

[59] These parties appear to be destined to have all of their issues dealt with in court. It is most unfortunate that this is the path they have chosen. I am not awarding any costs since in my view both parties achieved a degree of success. I would encourage these parties to try and return to some type of communication to resolve their issues aside from the litigation process. Litigation tends to foster animosity and the parties should be focused on being parents and role models to their three children.

"Forth J."

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