CANADA / JUDGMENT

Stevens v. Stevens

2020 BCSC 2055

COURT
Supreme Court of British Columbia

DECIDED
23 December 2020

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2020 BCSC 2055 Stevens v. Stevens

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stevens v. Stevens,

2020 BCSC 2055

Date: 20201223

Docket: E39848

Registry: Penticton

Between:

Colleen Jane Stevens

Claimant

And

Dana Phillip Stevens

Respondent

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment Re: Costs

Counsel for the Claimant:

D.M. King

Counsel for the Respondent:

I. McAndrews

Place and Date of Trial/Hearing:

Penticton, B.C.

December 15, 2020

Place and Date of Judgment:

Penticton, B.C.

December 23, 2020

[1] The claimant seeks costs arising out of this family law proceeding. My reasons for judgment from the trial are reported at 2019 BCSC 596. The trial was subsequently reopened on the issue of spousal support, and my decision on spousal support is found at 2020 BCSC 1339.

[2] The initial portion of the trial took place over nine days. The resumption of the trial on the issue of spousal support took one further day. The primary issues at the main trial related to the division of property. At the time of separation, the parties had three assets:

a) a family company known as Hayes Canyon Road Maintenance Ltd. ("Hayes Canyon");

b) the respondent's IWA pension; and

c) the former matrimonial home.

[3] The respondent ousted the claimant from the family company. Less than two years later, the company was adjudged bankrupt.

[4] At the trial, division of the remaining two assets was in issue. As set out in the reasons for judgment, I determined that both the pension and the former family home would be divided equally, subject to some adjustments.

[5] The claimant seeks her costs payable on a special costs basis, or in the alternative, seeks ordinary costs. She argues that the respondent's behaviour throughout the litigation, including the allegations he made at trial, are of a reprehensible nature such that the unusual remedy of special costs should apply.

[6] The respondent argues that success in the case was divided and that each should therefore bear their own costs.

Legal framework

[7] Costs are to be awarded to the successful party unless the court orders otherwise:

16-1(7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.

[8] The court in Barnard v. Barnard, 2017 BCSC 2162, found that in the absence of special circumstances, costs in family proceedings will follow the result and are payable in favour of the party who has achieved substantial success.

[9] In Gold v. Gold, the Court of Appeal addressed the question of when the court should order otherwise. At paragraph 20, the Court said the following:

[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.

[10] The onus of persuading the court that it should depart from the usual rule in 16-1(7) rests on the unsuccessful party (Rattenbury v. Rattenbury, 2001 BCSC 593).

[11] In Fotheringham v. Fotheringham, 2001 BCSC 1321, leave to appeal refused 2002 BCCA 454, Mr. Justice Bouck described the standard of "substantial success" as follows:

[45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.

[12] The above passage was cited with approval by our Court of Appeal in Marquez v. Zapiola, 2014 BCCA 35 (at para. 16). The Court of Appeal went on to describe that when no one party enjoys substantial success, the Court's practice is to order that each party bears its own costs, or alternatively to award the more successful party, as determined by "their success on the more important and time consuming issues", some portion of its costs.

[13] Special costs may be awarded in family law proceedings pursuant to Rule 16-1(b)(i). They are discretionary and are generally punitive in nature, awarded to express the court's disapproval of a parties conduct. In Garcia v. Crestbrook Forest Industries Ltd. [1994] 119 D.L.R. (4th) 740 (B.C.C.A.) at para. 17, the standard for an award of special costs is conduct that it is categorized as "reprehensible".

[14] Justice Gropper identified the principles that apply when considering whether to award special costs in Westsea Construction Ltd. v. 0759553 B.C. Ltd., 2013 BCSC 1352 at para. 73:

73 I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:

a) the court must exercise restraint in awarding specials costs;

b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;

c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;

d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;

e) special costs can be ordered against parties and non-parties alike; and

f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

The main trial

[15] The claimant was not the successful party with regard to the matters that were decided at the trial. The claimant's position was that assets should be apportioned in her favour in order to account for the respondent's destruction of the business of Hayes Canyon. She wished to keep the home and sought to reapportion the home in her favour to reflect what she said were the consequences of the respondent's conduct.

[16] While I made comment in my reasons regarding some of the respondent's conduct, I found that the claimant had not established that the respondent's conduct was the cause of the business failure. The claimant was successful with regard to certain adjustments that were made, including for some exclusions and some expenses incurred by her. However, this was a case of divided success, as the two remaining assets were ordered to be divided in accordance with the legislation.

[17] The question in this case is therefore whether the conduct of the respondent is such that the claimant is entitled to an order for special costs, even though she was not the successful party at the trial. I have concluded that she is not so entitled.

[18] There is no question that the respondent behaved poorly throughout the litigation. He ignored court orders including an order that he keep the mortgage current on the former family home. As a result of his breach of the order, the home went into foreclosure. It was reinstated due primarily to the efforts of the claimant. Justice Betton found the respondent to be in contempt of court and ordered special costs for that portion of the litigation.

[19] The respondent's conduct also included unnecessary behaviours that were designed to embarrass the claimant. These were outlined in my reasons for judgment. I will not repeat all of the details here. However, the perpetrator of many of the worst examples of the poor treatment of the claimant was the respondent's new partner, and not the respondent himself. These included trying to create difficulties for her with CRA, pretending to a member of the court staff in order to obtain information from third parties, and barging into an examination for discovery to make scandalous allegations about the claimant and her counsel. While the respondent could perhaps have done more, he is not liable for her actions.

[20] The respondent's failure to comply with the order that he keep the mortgage in good standing was a serious matter. However, Justice Betton found the respondent to be in contempt of court and he also ordered that the claimant was entitled to special costs. As such, that particular element of the respondent's conduct has already been dealt with.

[21] Trading in his motorcycle on another motorcycle contrary to the order prohibiting disposition of family property, while it cannot be condoned, is not conduct that rises to the level that would warrant special costs. Not every case of poor behaviour by a litigant will lead to a special costs order.

[22] In D.R. v. E.P.R., 2016 BCSC 550, the Court found the following at paragraph 75, as it relates to the conduct of parties in family law litigation:

[75] As I observed in M.S.G. v. S.K.G., 2014 BCSC 1344 at para. 141, family law lends itself to highly-charged emotions in an environment of anger and distrust. The non-legal issues often loom large and, in the minds of the parties, are indistinguishable from, and are often times of greater importance than, the disputes that matter from a legal standpoint. It is not uncommon for the parties' personal feelings to manifest in unfortunate conduct outside of the courtroom, and in a tendency towards exaggeration, juvenile behaviour and unreliable recounting of events at trial. For these reasons, it is my view that a reasonable dose of forgiveness should be afforded to family law litigants in evaluating their alleged misbehaviour in the litigation. Here, however, the claimant's transgressions far exceeded those bounds.

[23] However, at paragraph 76, the Court confirmed that it is the repeated conduct that may result in special costs:

[76] She knowingly and repeatedly concocted and exaggerated evidence for improper purposes, including trying to manipulate and deceive this Court to achieve goals in her own self-interest. She disobeyed more than one Court order, was found to be in contempt of this Court and consistently failed or refused to make proper financial disclosure. In short, the claimant confounded the litigation process at practically every step and demonstrated a pattern of concealment and distortion. Hers is precisely the kind of misconduct that is readily characterized as reprehensible within the meaning contemplated by the Court of Appeal in Garcia v. Crestbrook Forest Industries Ltd. (1994), 9 B.C.L.R (3d) 242 (C.A.), and its judicial lineage: See generally, Westsea Construction Ltd. v. 0759553 B.C. Ltd., 2013 BCSC 1352; Tomic v. Tough, 2013 BCCA 355.

[24] I do not consider the respondent's conduct as rising to the level referred to in the above-referenced case. While each case turns on its unique facts and circumstances, common threads through the majority of the cases to which I was referred were deliberate attempts by a party to mislead the court through false evidence and flagrant disregard of court orders. I have already touched on the previous order of contempt made by Justice Betton. The respondent did not manufacture, concoct or exaggerate evidence.

[25] The respondent made assertions regarding the claimant's bookkeeping that were unproven and frankly wasted a substantial amount of court time, something I will address below. However, it was the respondent's submission at the close of the trial that the two remaining assets be divided equally, and subject to some adjustments, the position prevailed.

[26] An award of special costs for the trial is therefore not appropriate.

[27] However, the time spent by the respondent at trial regarding the claimant's bookkeeping work warrants further consideration.

[28] Hayes Canyon was a road maintenance contractor, with all or substantially all of its work derived from Weyerhaeuser. The respondent operated and maintained the company equipment, and the claimant took care of administrative matters including the bookkeeping.

[29] Commencing immediately upon separation, the respondent relentlessly pursued the idea that the claimant had mismanaged Hayes Canyon's affairs. He terminated the claimant as the company's bookkeeper and also terminated the accounting firm they had used for many years because he thought them allied with the claimant. He then hired KPMG in Kamloops to perform what he described in his evidence as an audit, albeit clearly it was not one. That said, KPMG undertook some sort of investigation and determined nothing untoward.

[30] The respondent, clearly unhappy with that outcome, hired a new accountant, Mr. Chris Kelley and requested that Mr. Kelley perform an audit. Again no audit was done. Ultimately, the respondent had the trustee in bankruptcy undertake some form of review in the guise of searching for additional assets. None were found.

[31] Even though the respondent had previously hired numerous professionals with skills and training in the accounting field, each of whom had turned up nothing untoward, he persisted with his allegations regarding the claimant's bookkeeping work at trial. He conducted an unfocused and futile cross-examination of the claimant that meandered over the course of several hours regarding innocuous transactions he had identified in several large volumes of binders of irrelevant financial documentation that included several years of credit card statements, bank statements and receipts.

[32] It was apparent that the respondent did not understand the bookkeeping role, and his lack of understanding led him to believe, incorrectly, that the claimant had been doing things underhandedly. I will provide an example.

[33] Approximately three months prior to separation, the parties each had substantial credit card debt and they decided to take out a second mortgage. One month later, the claimant's credit card bill was at almost $25,000. The respondent tried to insist that this was evidence of nefarious conduct; however, she made no credit card charges in the intervening month, which was readily apparent from of brief review of the credit card statement. The evidence was very clear that the second mortgage proceeds were insufficient to pay off the credit cards, and the balance of almost $25,000 remained even after the loan proceeds were applied. However, the respondent persisted with his suggestion that the claimant had run up charges on the account.

[34] It was not obvious whether the respondent was suggesting that the claimant was an incompetent bookkeeper or a dishonest one. He succeeded in neither.

[35] However, it was patently obvious well before the commencement of the trial that pursuing that issue would be of no value because there was no evidence that the claimant had done anything untoward. The trial was unnecessarily extended because the respondent insisted on doggedly pursuing it in the absence of any evidence to support his allegations.

[36] I have reviewed my notes and I estimate that two days were wasted by the respondent's pointless pursuit of his unfounded allegations regarding the claimant's bookkeeping. The claimant is entitled to her ordinary costs for the two days that were wasted.

[37] The parties shall bear their own costs for the other days of the main trial, which reflects their divided success.

Continuation on the issue of spousal support

[38] For the reasons that I set out earlier, the claimant applied to reopen the trial. She was successful with that application, and the trial resumed on the narrow issue of spousal support.

[39] Although the trial was reopened, this was not a function of the behaviour or conduct of either party. At the time of trial, both parties earned a similar income and therefore no spousal support was ordered. Unfortunately, the claimant lost her job after the conclusion of the trial but before the order was entered and I therefore reopened the trial and awarded spousal support payable by the respondent following a one-day continuation.

[40] The respondent was asked on multiple occasions by counsel for the claimant in the time leading up to the continuation to provide his most recent income tax return. The trial resumed on September 3, 2020. The respondent did not produce his income tax return before the trial and did not bring it to the trial.

[41] I ordered him at the lunch break to go and get a copy of his tax return, which he did. With the tax return in hand, it was possible for me to reach a conclusion with regard to the respondent's income, which was in dispute.

[42] While I agree with the respondent that the order that I made in determining spousal support was in an amount that was less than the claimant had sought, albeit more than the respondent had suggested, the fact of the matter is that the one-day continuation of the trial was necessary in large part because the respondent refused to disclose the tax return. When determining income, it is difficult to conceive of a more relevant document than the prior year's income tax return. Nondisclosure has been described as a cancer in family law litigation: Cunha v. da Cunha (1994), 99 B.C.L.R. (2d) 93 (B.C.S.C.).

[43] There can be no issue that the document was in the respondent's possession and readily available, as evidenced by the fact that he returned to court after the lunch break with a copy in hand. He simply chose not to disclose it. I conclude that the claimant is entitled to special costs of the one-day continuation of the trial because if it were not for the lack of disclosure, the continuation could possibly have been avoided. Without it, resolution was impossible.

[44] I conclude that the claimant as the successful party is entitled to ordinary costs for her application to reopen the trial, and to special costs for the one day continuation conducted on September 3, 2020.

Conclusion

[45] The claimant is entitled to two days' of ordinary costs for the time wasted at the initial trial, ordinary costs for the application to reopen the trial, and special costs for the continuation on the issue of spousal support.

"Wilson J."

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