
CANADA / JUDGMENT

Stock v. Stock

2012 BCSC 1150

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Supreme Court of British Columbia

DECIDED

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2012 BCSC 1150 Stock v. Stock

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stock v. Stock,

2012 BCSC 1150

Date: 20120731

Docket: ED60745

Registry: Nanaimo

Between:

Kenneth Paul Stock

Claimant

And:

Lori Lee Stock

Respondent

Before: The Honourable Mr. Justice Bracken

Reasons for Judgment

Counsel for the Claimant:

B. R. Vining

Counsel for the Respondent:

A. L. Reid

Place and Date of Hearing:

Duncan, B.C.

June 27, 2012

Place and Date of Judgment:

Nanaimo, B.C.

July 31, 2012

- [1] This an application by the respondent Lori Stock to rescind an order filed as a "change order" on January 18, 2012. The effect of the order was to vary a final order dated December 8, 2010 made by the parties in this family law action and to terminate all future spousal support payable to Ms. Stock.

Facts and Background

- [2] The parties began living together in 1979 and they married July 19, 1980. They separated and were subsequently divorced. They had two children, a daughter who died in 1999 and their son who is now an adult and independent of the parties.
- [3] The claimant Kenneth Stock worked throughout his life in the forestry industry. He retired when his position was eliminated by his employer on January 10, 2012.
- [4] After the parties separated, Mr. Stock commenced a family action against Ms. Stock in an effort to resolve the issues of matrimonial property and spousal support. Both parties were represented by counsel and they reached an agreement that resolved all of the issues between them. A consent order was entered on December 8, 2010 setting out the terms of their settlement.
- [5] The order provided that Mr. Stock would pay spousal support to Ms. Stock in the amount of \$2,327 per month. There was no provision for review built into the order. Ms. Stock is disabled due to what has been described as a massive stroke and she is not employable. It appears that she has other health issues as well and she is currently in generally poor health. It appears that Mr. Stock complied with the order to pay spousal support up to and including the month of January 2012.
- [6] In December 2011, Ms. Stock was hospitalized as a result of a blood infection. Mr. Stock was aware of her hospitalization. Ms. Stock alleges that she was in very poor condition and was treated in the intensive care unit and had to be resuscitated on two separate occasions. She says that since her release from hospital, she has had increased difficulty with comprehension. There is some support for her allegation of diminished cognitive ability in an opinion Dr. Postuk who has been Ms. Stock's family doctor since 2002. He is fully aware of all of her health issues. In his letter of February 9, 2012, Dr. Postuk stated:

Her stroke of 2004 left her with marked muscular spasticity involving her trunk and extremities. To counter this, we have used a number of muscle relaxants over the years. Most recently she takes a medication call [sic] Cyclobenzaprine to relieve this spasm. This medication is a central nervous system depressant and induces drowsiness and often somnolence in people who take this drug. Lori takes this drug on a daily basis. It is my opinion that it is more than likely that Cyclobenzaprine and her history of a previous brain injury would cause a cognitive impairment that would affect her ability to understand a complex document without the help of another person.

- [7] A friend of Ms. Stock, Jody Lee Friday, says in her affidavit filed May 3, 2012 that her observation is that Ms. Stock has been somewhat "foggy" mentally since her release from hospital in December 2011. Ms. Stock claims that she has some difficulty with complex documents and often has a friend assist her.
- [8] Mr. Stock does not agree Ms. Stock has any cognitive difficulties. He says she displayed no sign of difficulty in comprehension or reduced cognitive ability when he spoke to her about this matter or on other matters since their divorce.
- [9] He attached to his affidavit a series of medical reports which described her treatment following her stroke and her general medical condition. These reports go back to 2004. He notes that nowhere in the medical documents or reports is there any mention of a cognitive deficiency.
- [10] Ms. Stock says that on January 10, 2012, Mr. Stock called her and told her that he had been laid off from his employment and was going to receive a severance package. He told her that as a result, he could no longer pay spousal support and that he would have to cease making payments. She says that she did not agree with that proposal. She was not told by Mr. Stock until after these proceedings were commenced that the amount of his severance package was approximately \$75,000.
- [11] Ms. Stock says that a few days later, Mr. Stock telephoned her and told her he was coming over to her apartment in approximately 45 minutes with some papers for her to sign. She says he told her it was necessary to sign the papers so she could claim one-half of his IWA pension as had been previously agreed. She agreed to meet him in the lobby of her apartment building.
- [12] She says that when he arrived he seemed to be in a hurry and kept talking to her while she tried to read the single page document he presented for her to sign. She said that she was not able to understand what the document said but believed, given their previous discussions, that it was related to the division of his pension. Without further comment, she signed the document, gave it to Mr. Stock and he immediately left.
- [13] A short time later Ms. Stock became concerned about what she had signed. She said she called her sister and discussed the matter with her. Ultimately she obtained a copy of the document. She took it to Ms. Reid, the lawyer who had acted on her behalf to settle the

family law action. After reviewing the document Ms. Reid wrote to Mr. Stock on January 25, 2012 and sent a second letter to him on January 26, 2012. In those letters, Ms. Reid advised him that Ms. Stock did not consider herself to be bound by the order of January 18, 2012 and said that an application would be made to set the order aside.

- [14] The single page document Ms. Stock signed was a draft order entitled "Change Order". It purported to vary the order of December 8, 2010 by deleting the spousal support provision requiring Mr. Stock to pay Ms. Stock \$2,327 per month and replacing it with the following provision:
2. As at the 2nd day of January, 2012, any and all claims that the Respondent, LORI LEE STOCK, may have against the Claimant, KENNETH PAUL STOCK, for maintenance and/or support for herself pursuant to the Divorce Act (Canada) and, in the alternative, pursuant to the Family Relations Act, R.S.B.C. 1996, c. 128 and amendments thereto be and the same is hereby dismissed.
- [15] Mr. Stock says that when his employment ended in January 2012 he advised Ms. Stock that she would be getting her share of his pension in lieu of spousal support. He said that he arranged to meet with her and presented her with the change order. He said that she read the document and signed it voluntarily. He denied putting any pressure on her to sign it and further denied that he was in a rush or that he kept on talking while she was trying to read it.
- [16] Mr. Stock is 58 years old and was working for a company operating under the name the "Teal-Jones Group" as a first aid attendant. Mr. Stock said that he was invited to a meeting on January 9, 2012 and was told that his job was to be eliminated. He was advised there were no other positions available for him and that he would receive the sum of \$75,159.40 by way of a severance package. If he agreed to accept the severance package, he was to sign a standard release form. He was presented with a letter outlining the terms of severance.
- [17] A copy of the letter from Teal-Jones Group to Mr. Stock is in evidence and it provides that part of the \$75,159.40 was to be paid by way of an initial payment into a retirement fund and the remainder was to be paid to him on a bi-weekly basis up to and including October 13, 2012. He chose to accept a \$25,000 payment into a retirement fund and the remainder bi-weekly. His standard benefits for MSP, dental and extended health and life were also to continue until October 13, 2012.
- [18] Mr. Stock denied an allegation made by Ms. Stock that he was a dominant and domineering partner to the point that he made all major decisions throughout their relationship and marriage, including all social decisions. Her allegation was in part supported by her sister, Cary Rogers, in an affidavit filed March 19, 2012.
- [19] For his part, Mr. Stock filed affidavits from his sisters and a niece who each deny that Ms. Stock had ever displayed any cognitive difficulties or that Mr. Stock acted in a domineering way towards her.

- [20] Mr. Stock said in his affidavit that on January 11, 2012, he telephoned Ms. Stock to advise her that he had a document for her to sign and that he would be there in approximately 45 minutes. He denied putting any pressure on her or hurrying her to sign the document and that she read it and signed it without any hesitation. He denied telling her that it had to do with her share of the pension.
- [21] He also said that he wrote a letter to her on January 10, 2012 explaining that he had lost his job and could no longer afford to make the spousal support payments. He indicated in that letter that their original agreement would have to be changed to eliminate the spousal support payment and replacing it with one-half of his pension. It is noted in that letter that he also said "You will be served with a copy of the application I made to the courts, don't panic it's not a summons."
- [22] In answer to her submission that she is without funds and has no money to live on save and except approximately \$500 of monthly income from other sources, Mr. Stock filed an affidavit to which he attached as an exhibit a copy of "A Guide to BC Employment and Assistance". He concluded from his review of the guide that Ms. Stock would be entitled to a monthly income of \$906 if she were to apply for assistance.
- [23] Ms. Stock relies on Rule 10-5 and ss. 15.2(6) and 17(1) of the Divorce Act as authority for her application. Both Rule 10-5 and s. 17(1) provide the court with jurisdiction to vary, rescind or suspend an order either prospectively or retroactively.

Discussion

- [24] Ms. Stock relies on the decision of *Miglin v. Miglin*, 2003 SCC 24. In that case, the court held that while judges should be reluctant to overturn private agreements or consent orders between parties, there will be circumstances where it is appropriate to do so. In *Miglin* the court created a multi-part, fact-driven test to be applied in applications to vary a final order in a family law matter. The first stage of the test focuses on the circumstances in which the order was made in an effort to see if it was fairly negotiated. The primary question is whether there was a fundamental flaw in the negotiation process that might constitute a reason to dismiss the agreement as an inadequate reflection of a consensual decision to change the terms of a final order.
- [25] Among the considerations in the first stage of *Miglin* is to determine whether one party was vulnerable and whether the opposing party took advantage of the other. The court is not to presume any vulnerability. The court is also examine the substance of the agreement or order at the time of formation to determine the extent to which it considers the factors and objectives and the broader objectives of the Divorce Act of finality, certainty and autonomy. If the agreement does not substantially comply with the objectives of the Divorce Act, it does not necessarily mean that the entire agreement should be set aside.

[26] At the second stage, the court is to analyze the circumstances at the time the application to vary is made and to consider whether the order should be disregarded due to a change in circumstance.

[27] Miglin provides no precise guidelines as to when agreements may be opened and varied. Thus, the Miglin test seems to afford a great deal of discretion to the judge who hears the application. The court is to determine whether negotiations were "fair"; whether the order substantially complies with the objectives of the Divorce Act; and whether the changed circumstances at the time of the application were reasonably anticipated and in compliance with the Divorce Act. Obviously, these are all highly subjective determinations.

[28] At para. 82 of Miglin the court made this comment:

We pause here to note three important points. First, we are not suggesting that courts must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context. There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution. Next, the court should not presume an imbalance of power in the relationship or a vulnerability on the part of one party, nor should it presume that the apparently stronger party took advantage of any vulnerability on the part of the other. Rather, there must be evidence to warrant the court's finding that the agreement should not stand on the basis of a fundamental flaw in the negotiation process. Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement. If separating or divorcing parties were generally incapable of making agreements it would be fair to enforce, it would be difficult to see why Parliament included "agreement or arrangement" in s. 15.2(4)(c). Finally, we stress that the mere presence of vulnerabilities will not, in and of itself, justify the court's intervention. The degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties.

[29] Ms. Stock also relies on the decision of *B.G.D. v. R.W.D.*, 2003 BCCA 259. At para. 12 the court said this:

As I understand the Miglin decision, any agreement purporting to deal in a final way with spousal maintenance is open to subsequent review by a court. It has narrowed the grounds upon which such an agreement might be set aside or varied but it nevertheless reaffirms the jurisdiction of the court to examine the agreement to determine whether the circumstances are such that it ought to be varied. In that respect it confirmed, at para. 51 of the decision, that the court has jurisdiction to review and reject the terms of pre-existing agreements, as that proposition was set out in *Pelech*, supra. It must be remembered that in *Pelech* the agreement was that the wife accepted the agreed terms for spousal maintenance in full settlement of all her claims then or in

future and that that agreement was incorporated in a consent order. Nevertheless, the court varied the agreement and the consent order.

- [30] In this case, Ms. Stock is seeking a rescission of the change order that was signed by her and dated January 18, 2012 and filed in court the same day. Counsel for Mr. Stock argues that there is no evidence that Ms. Stock has any cognitive difficulty. He points to the medical reports that were filed and notes correctly, that Dr. Postuk's letter does not contain a firm diagnosis but rather states that "it is more than likely" that her condition and medication would cause a cognitive impairment. Having said that, clearly her health is such that she is in a much weaker physical condition than Mr. Stock and all of the medical information indicates that she is completely unemployable.
- [31] Mr. Stock also submits that Miglin and other cases stand for the proposition that consent agreements between parties should be given deference by the courts and that Mr. Stock's changed financial situation provides a strong justification for the variation order that Ms. Stock signed.
- [32] Mr. Stock also relies on the decision of *Chepil v. Chepil*, 2006 BCSC 15. In that case, the wife prepared a handwritten separation agreement, presented it to the husband, and he signed it. In doing so, she gave up entitlement to her husband's pension; however, she gained relief from the debts of the marriage and maintained a designation as the beneficiary of his life insurance and other benefits. She later brought an application to share in the pension. The court dismissed her application.
- [33] The court in *Chepil* noted that there was no evidence of any fraud or any non-disclosure although more information no doubt could have been obtained. While I accept the principle that such an agreement is enforceable, here, the situation is reversed. Mr. Stock presented Ms. Stock with a prepared document and asked her to sign it. He did not disclose anything about his severance package other than the fact that he had been given one by his former employer.
- [34] I pause here to point out that a severance package is intended as compensation in lieu of notice. The one Mr. Stock received was structured so that the bulk of the money would be paid out on a bi-weekly basis in lieu of his usual income, throughout the notice period up to and including October 13, 2012.
- [35] Mr. Stock also argues on the strength of *Dawe v. Dawe*, [1985] B.C.J. No. 2673, (C.A.) that Ms. Stock is estopped by reason of the consent order from bringing any application to vary it. See also *McGowan v. McGowan*, [1995] O.J. No. 2245 (C.A.) and *Shackleton v. Shackleton*, [1999] B.C.J. No. 2653 (C.A.).

[36] In *Dawe*, by the terms of their agreement the parties clearly intended their agreement to be a final settlement of an action including all of the matters in dispute between them and the parties consented to a dismissal of the action. The court commented at para. 14 that it is "vital to the purposes of the Family Relations Act that there be an end to litigation and that negotiated settlements be encouraged." The court held the applicant was estopped by the final agreement and order.

[37] Essentially the same point was made by the court in *Shackleton*. In that case the final agreement was in the form of a consent order made on the first day of the trial. The order contemplated the possibility that Mr. Shackleton might lose his employment and provided for a reduction of child support and a review of spousal support if he was no longer employed. He received severance pay and his wife sought to re-open the consent order and claim a share of the severance pay as a family asset. Her claim was ultimately dismissed on the ground that there was no basis in law upon which the court could review, vary or re-open the consent order.

[38] In *McGowan*, the Ontario Court of appeal adopted the principle stated in *Monarch Construction Ltd. v. Buldevco Ltd.* (1988), 26 C.P.C. (2d) 164 at paras. 165 - 166 that:

A consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud. In other words, a consent judgment can only be rectified on the same grounds on which a contract can be rectified.

[39] In this case the change order was not a negotiated settlement and it is arguable that the principle stated in *Dawe*, *McGowan* and *Shackleton* should be applied to prevent the change order itself from being effective. The parties in this case entered into a final agreement and consent order that did not contemplate Mr. Stock's retirement or loss of his job or any reduction in spousal support.

[40] In some respects, it appears that the *Miglin* analysis should be applied to the initial intention of Mr. Stock to bring an application to vary the order of December 8, 2010, rather than the variation or change order of January 18, 2012. Had he done so, it seems to me that he would have had to bring himself within the analysis set out in *Miglin*. Instead of bringing such an application, so that Ms. Stock could have consulted Ms. Reid who to Mr. Stock's knowledge, had acted for Ms. Stock throughout these matters, he could have either proceeded to a formal court application or perhaps settled the matter.

[41] The effect of what took place, however, was that Mr. Stock first advised Ms. Stock that he had documents for her to sign that related to her ability to collect on his pension, something that was contemplated in the December 8, 2010 order. He then called to advise that he was bringing a document to her apartment so that she could sign it. She was anticipating documents with respect to the addition of a benefit, not the cessation of spousal support which at that time constituted essentially all of her monthly income.

- [42] Correspondence between Ms. Stock and Ms. Reid supports Ms. Stock's position. The correspondence relates to the issue of Mr. Stock's pension and apparently resulted from an inquiry made by Ms. Stock to Ms. Reid. An added factor is the haste in which the document was presented to her. Mr. Stock called her about 45 minutes before he arrived to say that he was bringing something for her to sign. While he denies putting any pressure upon her when he was in her presence, in my view, the circumstances created an atmosphere of at least some pressure upon Ms. Stock.
- [43] While I cannot find that there was any cognitive disability preventing Ms. Stock from comprehending or understanding what she was signing, her health situation is such as to make her vulnerable and I am satisfied that in all the circumstances, she had no clear understanding that she was giving up essentially all of her monthly income in exchange for nothing in return as the division of the pension had already been agreed to in the initial order.
- [44] Once parties have entered into a negotiated final agreement it is intended that the litigation will be at an end: Dawe, supra; Shackleton, supra. Where one party asserts that the other has consented to a variation of a final order, he or she will bear the onus of proving that the variation was a true agreement that is consistent with the intentions and expectations of both parties. That is not the situation in this case.
- [45] In all of the circumstances, I am satisfied that the change order dated January 18, 2012 should be rescinded and set aside and I so order. I find that there was no negotiation whatsoever leading up to the signing of the change order and I accept that Ms. Stock did not clearly understand that she was giving up essentially all of her monthly income and receiving only the share of the pension that had already been agreed to. She had no professional advice to advise her of the consequences of signing what appears to be a professionally drawn document. The agreement is not consistent with the intentions and expectations of Ms. Stock. In all of the circumstances I am satisfied the order must be set aside.
- [46] The result is that the order of January 18, 2012 is set aside and the original order of December 8, 2010 has remained in effect throughout, including the obligation to pay spousal support in the amount of \$2,327 per month. Ms. Stock is at liberty to enforce that order. Mr. Stock is at liberty to make an application to vary that order in the usual way, something in my view that he should have done in the first place rather than trying to take a draft order to Ms. Stock for signature. If he is successful in his application to vary the order, it is also open to him to seek to have that variation made retroactively. On that latter point, however, I do note that he will be receiving severance pay until October 13, 2012.
- [47] In the circumstances of this case, I am satisfied that Ms. Stock is entitled to her costs payable forthwith after taxation.

"J. K. Bracken, J."

The Honourable Mr. Justice Bracken

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