

CANADA / JUDGMENT

Thompson v. Thiam

2001 BCSC 964

COURT

Supreme Court of British Columbia

DECIDED

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2001 BCSC 964 Docket:

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Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JOANNE THOMPSON

PLAINTIFF

AND:

OMAR THIAM

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE ROWAN

Counsel for the plaintiff: J.S. Harvey

Counsel for the defendant: C.F. Ash

Dates and Place of Trial: January 15, 16, 17, 18, 24, 25,

26 and 30, February 12, 2001

New Westminster, BC

- [1] The plaintiff, Joanne Thompson (which was her name at the time these proceedings began), and the defendant, Omar Thiam, carried on a long-standing affair (as she maintains), or a committed relationship (as he maintains), which began in or about 1990 and ended in early 1997.

- [2] Mr. Thiam's counsel submits the parties should be classified as spouses within the extended definition of the term "spouse" found in s. 1(1) of the Family Relations Act, R.S.B.C. 1996, c. 128.
- [3] The defendant testified to the effect that he lived with the plaintiff in a marriage-like relationship for a period in excess of two years.
- [4] The plaintiff admits that she and the defendant conducted an affair during the years between 1990 and 1997, in which they engaged in an intimate relationship. However, she testified they each maintained separate residences and argued it could not be said they lived in a marriage-like relationship for the required two years.
- [5] The issues in this case are primarily claims of property rights and a claim by Ms. Thompson for repayment for having paid certain debts of the defendant.
- [6] At all times throughout and after their relationship, the plaintiff was a shareholder in, and an employee of, a private company referred to in the evidence as Univeyor. From her employment with that company she received a good income.
- [7] When the parties first met, the defendant operated several kiosks in various shopping centres in the Lower Mainland under the trade name, "A Touch of Africa". The plaintiff showed an interest in his merchandise and a friendship ensued. She loaned the defendant \$2,000 by way of a cheque dated July 21, 1990, the repayment of which was secured by a promissory note repayable on November 30, 1990.
- [8] The loan of \$2,000 was not repaid in cash; rather, it was agreed by the parties it would be applied toward the purchase of ten shares in a limited company to be incorporated by Mr. Thiam under the name "A Touch of Africa Enterprises Ltd."
- [9] On August 13, 1990, the plaintiff and the defendant signed a written agreement between themselves which was drawn without the benefit of legal assistance. There were some inconsistencies in the contract which was either an agreement by the plaintiff to purchase a 10% interest in the business that Mr. Thiam then carried on, or an agreement to purchase 10% of the shares to be issued in a limited company which would be incorporated to carry on that business.
- [10] The agreement was ambiguous as to whether Ms. Thompson was obliged to purchase more shares in the company or whether she had an option to acquire further shares in the company.
- [11] In any event, the agreement provided in para. 13:

CLOSING

The closing shall take place at the office of Z. Gamiet, 215 - 1956 W. Broadway, Vancouver, B.C. on Oct. 15, 1990, at 4.00 p.m. ...

Z. Gamiet was the defendant's then lawyer.

- [12] The closing of the agreement did not take place as agreed on October 15, 1990, as agreed, or at all.
- [13] However, the parties drew another agreement which I find superseded their first agreement. Mr. Gamiet had a substantial input into the new contract. The parties executed the new contract on November 2, 1990 and on the defendant's instructions, Mr. Gamiet incorporated for him a company called "A Touch of Africa Enterprises Ltd.".
- [14] Mr. Gamiet did not give evidence at the trial but I conclude from his solicitor's account (to be found at Tab 3, in Exhibit 1) that he incorporated the company, drew the original share certificates, drew the first minutes and ensured that shares were issued.
- [15] The defendant testified the plaintiff lost interest in the company before it got off the ground. I do not accept the defendant's evidence in this regard.
- [16] Ms. Thompson's services to the company continued for seven years. She paid to the defendant \$8,000 which was the purchase price for the shares she purchased in his company.
- [17] Ms. Thompson gave Mr. Thiam a cheque for \$2,000 on July 21, 1990, a cheque which the parties later agreed would be applied to the purchase price of shares in the company; a cheque for \$5,000 on August 13, 1990; and, a cheque for \$1,000 on September 4, 1990. I find these monies were paid for the purpose of buying shares in Mr. Thiam's limited company which was yet to be incorporated.
- [18] The defendant having agreed, in a written agreement of November 2, 1990, to re-purchase the shares the plaintiff had purchased, must buy them back and pay the monies he agreed to pay for them, i.e. the sum of \$8,000 together with interest as agreed upon in the agreement of the parties dated November 2, 1990.
- [19] Mr. Thiam's defence that Ms. Thompson did not comply with her obligation to pay him an additional \$15,000 constitutes no defence to this claim for repayment and, in any event, if there was a covenant on her part to make such a loan, that commitment terminated with the expiration of the August 13, 1990 agreement.
- [20] The defendant alleged in his pleadings that the plaintiff failed to perform duties but he did not call any evidence of any duties she failed to perform. I find the plaintiff paid the purchase price for shares in the defendant's company and performed the duties she had agreed to perform.

[21] The defendant pleaded s. 43 of the Company Act, R.S.B.C. 1996, c. 62, which requires shares to be fully paid before their issue. I find the defendant himself received the money for the shares as agent for the company and if he failed to transfer the money to the company for the shares, it ill behooves him to raise a defence that the shares were not paid for. I find the plaintiff paid for and received shares in the defendant's company.

[22] In his counter-claim, the defendant pleads in para. 1:

The Defendant and the Plaintiff commenced a common-law relationship on or about November, 1989, and cohabited as man and wife in residences occupied by both firstly at 15783 - 98 Avenue, in Surrey, British Columbia, registered in the name of the Plaintiff, and up to June, 1998, at 14160 - 84A Avenue, Surrey, British Columbia, in premises also registered in the name of the Plaintiff.

[23] In his evidence at trial, the defendant testified to the same effect. He testified that he had contributed to the acquisition, maintenance and improvements of both the 98 Avenue and the 84A Avenue properties. He testified the parties cohabited in the property on 84A Avenue from 1994 until their separation.

[24] At trial much evidence was called on the subject of whether the parties lived together as man and wife and whether they did so for a period exceeding two years, which could entitle one of the parties to maintenance in some circumstances.

[25] No maintenance was claimed by either party in this case but if a finding needs to be made on this subject, I accept the evidence of the plaintiff and find the parties did not live together in a marriage-like relationship for a period of at least two years.

[26] The plaintiff alleged in para. 7 of the statement of claim:

Throughout the parties' arrangement, the Plaintiff, from time to time, at the request of the Defendant, loaned to the Defendant and/or, at the request of the Defendant, to the company various sums of money by way of purchases made by the Plaintiff's Visa or by cheques. All sums advanced, the Defendant agreed he would personally repay the Plaintiff.

[27] In para. 8 the plaintiff pleaded:

Net of all just discounts, the total sum of money owed by the Defendant to the Plaintiff the total sum of \$27,251 comprised of \$18,751 expenses incurred by the Plaintiff on her Visa card and \$8,500 cash.

[28] The plaintiff has proved the advance of \$8,500 cash as alleged in the statement of claim.

[29] The plaintiff has filed a statement of account (Exhibit 2, Tab 3) alleging more than the \$18,751 said to be paid by her on the Visa account for the defendant's benefit. The defendant, on the other hand, maintained he delivered to the plaintiff large sums of cash to cover his obligations to her. The defendant's evidence lacked specificity and I would not be inclined to accept his evidence in this regard. The matter will be referred to the Master to review the account presented by the plaintiff and to certify under Rule 32(2) of the Supreme

Court Rules of Court, the amount owing by the defendant to the plaintiff in debt. The plaintiff has proved to my satisfaction thus far that she advanced to the defendant by way of loan, the sum of \$8,500 and that she has paid Visa bills that were incurred by the defendant. Should it be found that the plaintiff expended more than \$18,751 on the Visa account for the defendant's benefit, judgment under this head shall be limited to \$27,251, the amount claimed in para. 8 of the plaintiff's statement of claim.

- [30] In 1992 the parties purchased a condominium in Port Moody referred to in the evidence as the "Westhill Place condominium". The title to this property was recorded in the name of the parties as "tenants in common". In 1993 the parties purchased another condominium referred to in the evidence as the "Contessa condominium". Title to this property was recorded in the names of the parties as "joint tenants".
- [31] The plaintiff gave evidence at trial of unequal contributions by the parties toward the purchase price of the condominiums. I accept the plaintiff's evidence that there were unequal contributions toward the initial purchase price of the condominiums. However, I do not find the parties made any agreement to contribute equally to the initial purchase price of the condominiums. When the properties were conveyed to them in 1992 and 1993, each party received an equal ownership interest in the properties without the requirement that either contribute to the down payment. However, after the initial down payment was made and the properties were transferred to them, there were unequal contributions toward the outgoings and expenditures. The parties are entitled to receive reimbursement from the other of them for any excess of payments made by either of them toward the mortgages, taxes and other outgoing expenditures for the two properties.
- [32] I direct the Master to pass the accounts of the parties for the expenditures they have made for the two properties following the initial purchase of those two properties and I direct the Master, pursuant to Rule 32(2), to certify the amount or amounts due and owing from one of them to the other.
- [33] With respect to the defendant's counter-claim, I accept the plaintiff's evidence that she did not live together with the defendant as man and wife. Particularly she did not live with him at 84A Avenue, or 98 Avenue in Surrey. It was not shown that Mr. Thiam made contributions to the plaintiff that would sustain his claim for unjust enrichment; his claim for unjust enrichment has not been established at this trial. Far from being unjustly enriched, it would seem the plaintiff contributed substantially in money and effort to the defendant's financial well-being.
- [34] The defendant's claim for the return of chattels and possessions mentioned in para. 10 of his counter-claim is dismissed. The plaintiff has established that she purchased from the defendant and paid him for the mahogany grand table and six hand-carved chairs mentioned first in the list in para. 10 and I find she is entitled to that table and those chairs. As to the other items listed in his claim, it has not been proven they are in the plaintiff's possession. However, if any of the other items listed in para. 10 of the counter-claim are in

the plaintiff's possession, they must be returned to the defendant.

[35] Under the claim made in para. 13(a) of the plaintiff's statement of claim, she shall be entitled to judgment against the defendant for \$8,500 together with prejudgment interest at the rate of 6% per annum on that sum from the time the writ was issued in this action. The portion of the claim relating to expenditures made by the plaintiff for the benefit of the defendant on the Visa card, will be referred to the Master. The Master will certify under Rule 32(2) of the Supreme Court Rules of Court, the amount owing by the defendant to the plaintiff for Visa card expenditures made by the plaintiff for the defendant's benefit.

[36] Under para. 13(b) of the statement of claim, the plaintiff claimed:

An order that the defendant pay to the plaintiff the sum of \$8,000 together with interest at an annual rate of interest paid, from time to time, on Canada Treasury Bills in exchange for the return of the plaintiff's shareholdings in Touch of Africa Enterprises Ltd., as per a written agreement between the plaintiff and the defendant dated November 2, 1990.

[37] The plaintiff is awarded the sum of \$8,000 together with interest as set out in the claim from the date the writ was issued until judgment.

[38] In para. 13(c) the plaintiff sought:

An order that the defendant pay to the plaintiff the sum of \$10,000 in respect of the parties' agreement for the purchase of condominiums as described in the statement of claim herein together with interest thereon and the defendant's share of expenses in connection of the operation of the condominiums or, alternatively, for a declaration of resulting trust that the defendant holds in trust for the plaintiff his interests in the lands and premises located at ...

[39] The plaintiff's claim for \$10,000 to equalize the purchase price of the condominiums is dismissed. I do not find in the evidence, nor do I accept, there was an agreement that the parties would equalize the down payment of the purchase price on the condominiums. However, under this claim there will be an accounting of the respective claims by the plaintiff and the defendant for their contributions to the mortgage payments, taxes and expenditures made by the parties in preserving and maintaining the condominiums. This matter will be referred to the Master to certify the amounts owing from one party to the other under Rule 32(2).

[40] The plaintiff will have her costs on Scale 3.

"J.F. Rowan, J."

The Honourable Mr. Justice J.F. Rowan

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