
CANADA / JUDGMENT

Unger v. Unger

2015 BCSC 1408

COURT

Supreme Court of British Columbia

DECIDED

13 August 2015

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2015 BCSC 1408 Unger v. Unger

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Unger v. Unger,

2015 BCSC 1408

Date: 20150813

Docket: D31591

Registry: New Westminster

Between:

Lillis Bell Unger,

Also known as Lillis Bell Lenton Unger

Also known as Lillas Belle Linten Unger

Plaintiff

And

Jacob Unger, Deceased

Defendant

Before: The Honourable Mr. Justice A. Saunders

On appeal from: An order of the Supreme Court of British Columbia, dated February 19, 2015 (Unger v. Unger, 2015 BCSC 348).

Reasons for Judgment

Counsel for the Plaintiff:

R.J. Cuddeford

Counsel for the Defendant:

D.K. Magnus

Place and Date of Hearing:

New Westminster, B.C.

March 12, 2015

Place and Date of Judgment:

New Westminster, B.C.

August 13, 2015

- [1] The defendant Jacob Unger appeals an order made by a Master on February 19, 2015, by which the defendant's application for an order dismissing the plaintiff's claim for want of prosecution was dismissed, and the plaintiff was given leave to amend her pleadings.
- [2] The factual background to the application is set out in the Master's Reasons for Judgment, indexed at 2015 BCSC 348. For ease of reference, I reproduce portions of those reasons here:
- [2] The facts in a nutshell are that the parties were legally married on March 13, 1981 and separated on May 16, 1993. This action was commenced on June 8, 1993. An order was pronounced by Master Tokarek on July 7, 1993, giving a declaration that there was no reasonable prospect of reconciliation and prohibiting the parties from dealing in any way with the family assets save for reasonable living expenses. That order was never varied.
- [3] The defendant severed title to the matrimonial home which had been held jointly on July 13, 1993 such that the parties held the property as tenants in common. The plaintiff says that she was never advised of this by the defendant.
- [4] Later in 1993, in or about the fall of 1993, the parties reconciled and again began to live together as husband and wife. On September 24, 2003, the defendant wrote a Will which disinherited the plaintiff, who again alleges that she was told nothing about this by the defendant. In the Will, the defendant wrote as Clause 6:
 - 6. I have not provided for my wife, Lillis Belle Unger, in this Will because during my lifetime I caused to be transferred to my wife title to 50 percent of the property located at 22674 132nd Avenue, Maple Ridge, British Columbia [I will leave out the legal description] without any contribution from her to the acquisition or preservation of that property.

[5] When probate was sought, the Statement of Assets, Liabilities and Distribution disclosed that the only asset of significance in the estate of the defendant was that matrimonial property said to be held by the parties as tenants in common with a value of \$763,000. The defendant's portion of that is claimed as part of the estate in the amount of \$381,500. The total gross value of the estate claimed is only \$410,504.75.

[6] I am going to refer to the affidavit of the plaintiff in some detail as I feel her evidence is important. She says:

The respondent and I separated in 1993 and I started this litigation. The respondent and I reconciled in 1993 but I was unaware that he had changed title to the house. We lived together as husband and wife until he died on September 7, 2013. The respondent was always very secretive about money but I knew he had a lot because he would brag to people about having a lot of money and being able to retire at the age of 44. The respondent and I -

[7] I should say that, although the parties are referred to as petitioner and respondent in this affidavit, it is my understanding that they are in fact plaintiff and defendant, not that anything turns on that. In any event:

The respondent and I both had health issues and the respondent was in and out of hospital in 2012 and 2013. In the spring of 2013 the doctors called a family meeting at the Ridge Meadows Hospital where the respondent was about to be discharged from. The respondent suffered from dementia and he would wander and be violent at night.

I could not take care of the respondent by myself and he went into the Maple Ridge Seniors' Centre ("the Seniors' Centre").

I went to the bank and asked if some of the extras paid to the Seniors' Centre could be paid out of one of the respondent's other accounts. They told me that his daughter, Brenda Lorraine Ramsey ("Lorraine"), was on his accounts with him and there was nothing I could do. I did not understand what that meant other than Lorraine could pay for the extras and I asked her to do so. She refused.

I expected to be left something in the Will and not be disinherited entirely. I did not know the content of the respondent's Will until just before he passed away. He had always just said to me, "You've got nothing to worry about." I did not know or understand that the respondent arranged for substantial financial assets to go to Lorraine directly until after he passed away. Since the respondent died, I have found banking records showing the respondent would transfer around hundreds of thousands of dollars. I do not know where that money went but there is no way the respondent spent it. If I had known the extent of the respondent's efforts to leave me nothing when he was alive, I would have gone to a lawyer to get some advice and taken some action to protect myself.

Reasons of the Master

- [3] The Master set out the considerations that a court is bound to take into account on hearing such an application for dismissal, as set out in *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at para. 27. Those considerations, summarily, are the length of the delay in prosecuting the action, and whether the delay was inordinate; the reasons for the delay; the nature and severity of prejudice to the defendant caused by the delay; and the interests of justice.
- [4] As to the issue of delay, the Master stated:
- [9] The plaintiff admitted that there was an inordinate delay after the reconciliation in 1993 until the filing of the Notice of Intention to Proceed in November 2014. The delay, according to the plaintiff, is due to the reconciliation of the parties and the concealment on the part of the defendant of his severing the joint tenancy on the property and his divesting himself or his estate of most, if not all of his other assets, all of which were arguably family assets.
- [5] The Master considered whether the limitation period governing the plaintiff's claim had expired, such that a new action could be commenced, and the implications of this in respect of the defendant's position that it was prejudiced by the lapse of time. The Master said as follows:
- [11] The plaintiff obviously takes the position that the defendant concealed what he had done in divesting himself and his estate of assets. The earliest the plaintiff knew of that on the evidence before me was after the spring of 2013, when she made enquiries of the bank for the payment of the defendant's senior care centre expenses and her subsequent enquiry of the daughter. Had she been more legally aware, she might have sought advice and brought action at that time. Regardless, on the basis of this evidence she is within the two-year limitation period for commencing an action.
- [12] The defendant argues that there is serious prejudice if this action is continued. There has been a loss of the key witness, namely, the defendant himself, and a loss of documents, which is understandable and could even be presumed given the time that has passed. However, in my view, it is not the continuation of this action that causes prejudice to the defendant. The alternative is for the plaintiff to commence a new action. That new action would bring with it all of the problems complained of by the defendant.
- [13] The plaintiff, on the other hand, asserts that there are procedural benefits to the parties if the action is maintained in this proceeding rather than commencing a new action.
- [14] It is argued by the defendant that the plaintiff should bring whatever complaint she has by way of a Wills Variation proceeding.
- [15] That, however, would obviously not capture the entire claim advanced by the plaintiff, as she says the defendant wrongly divested himself and the estate of assets. As some of those assets are no longer in the estate, they cannot be pursued in a Wills Variation action. The only

asset of significance that the plaintiff could claim in a Wills Variation proceeding would be the remainder of the title to the matrimonial property. She will presumably be seeking other remedies with respect to the property she says that the defendant wrongly alienated, such as his bank accounts and RRSPs.

[6] In her Reasons, the Master concluded as follows:

[16] On balance, I can see no benefit in requiring the plaintiff to bring a new action. The pleadings in this action are capable of being amended to properly encompass the claims now being advanced. The plaintiff can seek leave to add additional parties if necessary. I am advised by counsel for the plaintiff that the plaintiff can still amend her pleading as of right.

[17] As there is equal prejudice to the defendant one way or another, it is in the interests of justice that the plaintiff should be able to pursue this matter in the manner she considers most expedient. Thus, the application is dismissed with costs to the plaintiff in the cause. I direct the plaintiff to amend her pleading within 30 days.

[7] On the hearing of this appeal, the plaintiff submitted that the "procedural benefits" referred to at paragraph 13 of the Master's Reasons are the fact that no declaration that the spouses had no reasonable prospect of reconciliation could now be made under s. 57 of the former Family Relations Act, R.S.B.C. 1996, c. 128 in any newly-commenced action, given that the defendant is deceased - the rule in *Ginter v. Ginter* (1984), 15 D.L.R. (4th) 146, 59 B.C.L.R. 11.

[8] I note that the position of the plaintiff in respect of the defendant's conduct has been clarified through the amendments to the notice of family claim that were filed on March 10, 2015, pursuant to the Master's order. The plaintiff now seeks unequal division of the family property and family debt on the following grounds:

- a) matrimonial property of the parties were disposed of or gifted by the Respondent to third parties without the knowledge or consent of the claimant;
- b) pursuant to the Land Title Act a Certificate of Lis Pendens was filed on June 17, 1993 against the family home. An order pronounced July 7, 1993 by Master Tokarek restrained the Claimant and the Respondent from disposing of, encumbering, or dealing with in any way with the family assets or other property in issue, save and except for reasonable living expenses, by consent. On July 13, 1993 without informing the Claimant, the Respondent severed title to the family home, such that the title was legally switched to Tenancy in Common;
- c) the Respondent controlled the matrimonial assets and kept knowledge of his financial dealings secret from the Claimant;
- d) the parties did resume cohabitation in the Fall of 1993, however it was not a genuine reconciliation. It was a fraudulent reconciliation in that the Respondent never intended and in fact never did resume cohabitation as husband and wife with the plaintiff;

- e) unbeknownst to the Claimant, on September 24, 2003 the Respondent published a Will disinheriting the Claimant; and
- f) without the knowledge or consent of the Claimant, on a date or dated unknown to the Plaintiff, the Respondent disposed of substantially all of the matrimonial assets wither directly or by placing them in joint names with third parties such that all legal interests in the said assets passed to the third parties upon the passing of the Respondent, Judicial reapportionment is required on the basis of fairness.

Standard of Review

- [9] In *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.), Justice Macdonald stated:

An appeal from a master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the master raises questions which are vital to the final issue in the case, or results in one of those final orders which a master is permitted to make, a rehearing is the appropriate form of appeal.

- [10] In the present case, the Master's order did not touch upon the merits of the claim, and was not determinative of the parties' rights. The Master simply decided that the delay in the claim being prosecuted was not grounds for the action being dismissed. This was a purely interlocutory matter. The onus is on the defendant to show that the Master was clearly wrong.

Discussion

- [11] The defendant says that the Master improperly considered allegations not found in the pleadings as were originally filed in 1993. I find no merit in this submission. The late defendant's alleged concealment of his transfer of family assets serves to explain the delay. It may also deserve consideration in respect of the merits of the plaintiff's claim for unequal division of family assets.
- [12] The defendant says that the Master failed to appreciate the effect of the reconciliation of the parties, in that a declaration of irreconcilable differences does not survive a reconciliation. In this regard the defendant relies upon *Guillevin International Inc. v. Willems* (1994), 118 D.L.R. (4th) 765, 95 B.C.L.R. (2d) 281 (S.C.). *Guillevin*, however, does not go so far as to say that a reconciliation suspends operation of an order made under s. 67 of the Family Relations Act restraining a party from disposing of family assets. Further, and in any event, the plaintiff now pleads the reconciliation was a sham.

- [13] The defendant submits that an existing claim under the Family Relations Act cannot be amended after the death of one of the parties. However, the cases relied upon by the defendant in support of this submission - Momot v. Momot (1983), 34 R.F.L. (2d) 245 (B.C.S.C.), Welling v. Welling (1987), 16 B.C.L.R. (2d) 379 (S.C.), and Zuk Estate v. Zuk, 2007 BCSC 300 - dealt with situations where no s. 57 declaration was made prior to the death of the spouse.
- [14] The defendant's submissions as to the prejudice to the defence of continuing with the proceeding amount to a re-argument of the case put before the Master. The Master took the factor of prejudice into account.
- [15] I cannot conclude that the Master was "clearly wrong".
- [16] The appeal is dismissed.
- "A. Saunders J."

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