NOVA SCOTIA COURT OF APPEAL
Citation: ***Jachimowicz v. Jachimowicz***, 2009 NSCA 65

Date: 20090616
Docket: CA 304986
Registry: Halifax

Between:

Cathy Loretta Jachimowicz

Appellant

v.

Jan Michael Jachimowicz

Respondent

Judges:	Bateman, Saunders and Hamilton, JJ.A.
Appeal Heard:	June 11, 2009, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Bateman, J.A.; Saunders and Hamilton, JJ.A. concurring.
Counsel:	Charles D. Lienaux, for the appellant Deborah Conrad, for the respondent

Reasons for judgment:

[1] At the conclusion of the oral hearing we announced that the appeal was dismissed with brief reasons to follow. These are our reasons.

[2] Cathy Loretta Jachimowicz appealed an Order of November 20, 2008 dismissing her October 13, 2006 application to set aside the property division contained in a Corollary Relief Judgment (the "CRJ"). The application was made pursuant to **Civil Procedure Rule** (1972) 15.08(b). The commendably sound and thorough reasons for judgment of Justice Moira Legere Sers of the Nova Scotia Supreme Court Family Division are reported as **Jachimowicz v. Jachimowicz**, 2008 NSSC 325 and provide a complete history to these proceedings.

[3] On November 12, 2004 the parties, who were both represented by counsel, entered into a comprehensive settlement agreement, made in contemplation of divorce, which resolved all matters between them including custody, access, child and spousal support and a division of property.

[4] In November, 2005, before the finalization of the divorce, the custody and access issues became contentious resulting in a divorce hearing in January, 2006 with those issues alone in dispute. The divorce judgment of March 28, 2006 included an adjudication of the custody and access issues. At the request of the parties, the property and spousal maintenance resolution contained in the November 12, 2004 agreement were incorporated into the CRJ of the same date. Both parties continued to be represented by counsel.

[5] The application to set aside the property division alleges, *inter alia*, that the respondent committed perjury by filing a false Statement of Property and that he intentionally failed to disclose assets.

[6] Applying the standard of review from **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235, recently restated by Fichaud J.A. for this Court in **Brannan v. Exxon Mobil Corporation**, 2009 NSCA 53 at para. 28, we were of the unanimous view that this appeal ought to be summarily dismissed.

[7] The appeal is fundamentally flawed in that the appellant's submissions are premised on a set of facts materially inconsistent with those found by the hearing judge. The appellant is seeking a retrial under the guise of an appeal.

[8] The following points are sufficient to dispose of the issues raised by the appellant:

> The judge did not err when evaluating the appellant's claim that the CRJ should be set aside on grounds of fraud and, in particular, by considering whether the applicant had exercised due diligence at the relevant time (see **International Corona Resources Ltd. v. LAC Minerals Ltd.**, (1988), 66 O.R. (2d) 610 (H.C.), as referenced in **L.R.F v. D.M.H.**, [1999] O.J. No. 2757 (Q.L.) at para. 13, cited by the respondent);
>
> The judge's finding that the appellant failed to exercise due diligence both at the time of entering into the settlement agreement and at the time of its incorporation into the CRJ is supported by the record and was fatal to her claim. However, the judge went on to consider, in detail, the appellant's additional allegations of fraud, perjury and duress and found that they were not proved. She did not err in so concluding;
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> The record is clear that the contested issues at the divorce hearing were limited to custody and access. The division of assets was presented to the court as settled by the agreement which was incorporated into the CRJ at the request of the parties;
>
> Contrary to the frequent assertions by the appellant throughout the factum, there was no non-disclosure of assets. This was confirmed at the hearing by the appellant's own expert witness;
>
> The appellant's credibility was irreparably damaged by proven untruths in her own affidavit; material contradictions with the evidence of her former counsel about the circumstances surrounding the agreement; contradictions within her own

> evidence; and by misinformation provided to her expert witness, all as detailed in the reasons for judgment and supported on the record;
>
> The decision of the Supreme Court of Canada in **Rick v. Brandsema**, 2009 SCC 10 is factually distinct and has no application here.

[9] As was made clear from our exchanges with counsel for the appellant at the hearing, this is not a forum for a retrial. Absent error of law or an obvious and determinative error of fact this Court will not intervene.

[10] We are satisfied that Justice Legere Sers was correct on questions of law; that she made no palpable and overriding error of fact; and that her assessments of credibility, to which we owe considerable deference, are all supported on a reasonable view of the evidence.

[11] The appeal is dismissed with costs. Taking into account the complete absence of merit to this appeal; the multitude of issues raised; and the voluminous record we would fix the costs payable by the appellant to the respondent at $6500 (inclusive of disbursements) representing 40% of the trial costs.

Bateman, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.