NOVA SCOTIA COURT OF APPEAL
Citation: *Murphy v. Murphy*, 2013 NSCA 144

Date: 20131206
Docket: CA 415259
Registry: Halifax

Between:

Sandra Christine Murphy (Layton)

Appellant

v.

John Killam Murphy

Respondent

Judges:	Oland, Fichaud and Bryson, JJ.A.
Appeal Heard:	November 25, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs of $1,000, per reasons for judgment of Fichaud, J.A.; Oland and Bryson, JJ.A. concurring
Counsel:	Douglas Lutz and Jennifer E. Barnes, for the appellant James J. White, for the respondent

Reasons for judgment:

[1] This is an appeal from a Supreme Court judge's finding of civil contempt arising from a divorce.

Background

[2] Ms. Layton and Mr. Murphy married in 1986 and separated in 2008. In December 2011, they appeared before Justice Warner of the Supreme Court of Nova Scotia for their divorce. Justice Warner issued the Divorce Order on December 13, 2011, and the Corollary Relief Order ("CRO") on February 2, 2012.

[3] The CRO required that Mr. Murphy pay to Ms. Layton monthly child support for their two children and monthly spousal support.

[4] The CRO's provisions for the division of matrimonial property included:

> 8 Property is divided under the *Matrimonial Property Act* as follows:
>
> (a) Sandra Christine Murphy shall retain possession of the following matrimonial assets:
>
> (i) Matrimonial home located at 486 Bains Road, Centreville, Nova Scotia …
>
> …
>
> (b) John Killam Murphy shall retain possession of the following matrimonial assets:
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> …
>
> (iv) 15 ft speed boat and 27 ft cabin cruiser with an estimated combined value of $16,500.00.
>
> …

[5] Mr. Murphy works internationally in the oil industry. After the divorce proceeding, Mr. Murphy returned to Africa, where he resides. The speed boat and cabin cruiser, retained by Mr. Murphy under the CRO, remained on the property at 486 Bains Road, that Ms. Layton retained under the CRO. The boats' accessories included motors and trailers, but these were not specifically mentioned in the CRO.

[6] In mid - 2012, Mr. Murphy and Ms. Layton exchanged acrimonious emails about the boats, motors and trailers. Ms. Layton took the position that the CRO entitled Mr. Murphy to the boats, but not the motors and trailers for the boats, and that Mr. Murphy should move the boats from her property, but, if he moved the motors and trailers, she would report the matter to the RCMP as theft. On May 27, 2012, she emailed: "It will be presumed that if the boats are still on the property by the end of today you have chosen to abandon them" and "as of tomorrow they will be put up for sale". Mr. Murphy felt that the CRO entitled him to the boats, including the motors and trailers as accessories. But he chose not to risk police charges. He made it clear that he was not abandoning the boats. He tried unsuccessfully to take possession through a third party, Mr. Bennett, and by suggesting arrangements through his lawyer. He emailed Ms. Layton with the suggestion that "[w]e take it to court and let the judge decide". The disagreement was unresolved, and the boats, motors and trailers remained on the Bains Road property.

[7] In August 2012, Ms. Layton traded the 15 ft speed boat to a third party in return for some work on her farm. She did not compensate Mr. Murphy.

[8] Ms. Layton sold 486 Bains Road in November 2012. She moved the 27 ft cabin cruiser to another location. She says the boat is in storage. She has not yet, over a year later, informed Mr. Murphy of the boat's location.

[9] Mr. Murphy filed with the Supreme Court a Notice of Motion that Ms. Layton be held in contempt. Both parties filed affidavits and, represented by counsel, attended at the hearing before Justice Warner on March 20, 2013. There was no cross-examination on the affidavits.

[10] Justice Warner gave an oral decision on March 20, 2013, after the hearing, followed by an Order of April 8, 2013. He ordered that Ms. Layton be held "in civil contempt of the Corollary Relief Order", that the penalty be a credit to Mr. Murphy of $16,500 against spousal support, plus costs of $1,000 also credited toward spousal support, and that Ms. Layton be the owner of the two boats. The $16,500 was the judge's finding of value of the two boats, based on the evidence and property statements at the divorce hearing, confirmed by clause 8(b)(iv) of the CRO. Later I will discuss the judge's reasons.

Issues

[11] Ms. Layton appeals. Essentially, she makes three arguments. She says that the judge erred by: (1) implying into the CRO an obligation that was not clearly stated in that Order, (2) finding contempt based on insufficient evidence, and (3) in his choice of remedy, by varying the CRO.

Standard of Review

[12] In *Godin v. Godin*, 2012 NSCA 54, para 43, this Court applied to a contempt appeal the normal appellate standard to a decision of a judge, *i.e.* that stated in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. The *Housen* standard means the Court of Appeal examines (1) for correctness to determine whether there is an error of law or principle, and (2) for palpable and overriding error to determine whether there is an error of either fact or mixed fact and law with no extractable legal error. Further, to the extent that the judge exercised a discretion delegated by law, this Court also examines to determine whether the discretionary ruling resulted in a patent injustice: *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras 22, 26-29, which reviewed the line of Nova Scotia authorities. That is the approach that I will apply.

[13] In my view, this statement of the standard of review is substantially the same – though worded somewhat differently - as the Alberta Court of Appeal's approach in *Metropolitan Life Insurance Co. v. Hover*, 1999 ABCA 123, para 10, that this Court quoted in *Soper v. Gaudet*, 2011 NSCA 11, para 21.

Analysis

[14] As to the legal principles - in *Godin*, para 47 and *Soper*, para 23, this Court noted that, as contempt of court is quasi-criminal, the onus is on the party alleging civil contempt to prove beyond a reasonable doubt that the alleged contemnor, acting with *mens rea*, has clearly breached the unambiguous terms of an order of which the contemnor had proper notice. In *Soper*, paras 48-49, the Court adopted Justice Cromwell's statements in *TG Industries Ltd. v. Williams*, 2001 NSCA 105, paras 11, 13, 17, 19 that (1) "civil contempt may be found in the absence of proof that the alleged contemnor intended to disobey the order", (2) "[t]he core element

of civil contempt is failure to obey a court order of which the alleged contemnor is aware", (3) "[t]he core elements of civil contempt are knowledge of the order and the intentional commission of an act which is in fact prohibited by it" [underlining in *Soper*], and (4) "[t]here is a long line of authority for the view that intention to disobey is not an element of civil contempt". In *Soper*, para 49, this Court added:

> Although it is not necessary to prove the intention to disobey, there still has to be evidence of a failure to obey the court order.

[15] I will turn to Justice Warner's application of the principles in this case.

[16] The judge's oral decision summarized the background:

> … It was clear at the time of the Divorce that the parties had no use for each other and had shown the worse [*sic*] of character in respect of their dealings with each other. Part of the resolution of the matrimonial – part of the resolution of the matter resulted in the two adult – of the two children of the marriage remaining in Mom's care at home, while Dad basically, was perpetually overseas working in the oil industry in – if I remember correctly – high risk areas, but making high risk money, which fortunately provided for significant payments of child support and spousal support in recent years. The matrimonial property was divided primarily in favour of Ms. Layton – the matrimonial home, being the biggest of the assets. Mr. Murphy retained a 401K, some stock which between them had a value of around eighty thousand dollars ($80,000.00). There's another RRSP making ninety thousand ($90,000.00) together with a 15 foot speed boat and 27 foot cabin cruiser with an estimated combined value of sixteen thousand five hundred dollars ($16,500.00). The affidavit evidence before the Court is that, after the Court's Order and this is the affidavit of Ms. Layton – she offered to allow Mr. Murphy to keep those boats on her property for a period of time, which appears not to have been specified, as opposed to him arrange to move them immediately. That was an unfortunate offer. In the spring, her affidavit provides that she told him to move them and on May 27th, she gave him a deadline of that day to move them or she would deem them to have been abandoned. It's clear from the exchange of emails and correspondence evident and not in doubt, based on the affidavits and based on Ms. Layton's statement that he was to have nothing and be nowhere near her, probably an appropriate circumstance based on his foul language and feelings toward her and that he wasn't to touch her property without prior arrangements. He went through the lawyers to make arrangements. He was given a deadline on May 27th of, "The end of the day or I deem them abandoned." to which he replied on the next day, "No I'm making efforts." in quite candidly, a fairly conciliatory email from that of May 27th. In several – in August of 2012, Ms. Layton carried out her threat by trading the boat, motor and

> trailer, having disputed that the trailer and motor were part of the boat with Mr. Murphy, to a contractor who was renovating the house, for which she says, she got a credit of five hundred dollars ($500.00). …

[17] The judge then discussed whether Ms. Layton's conduct, respecting each boat, was civil contempt:

> In respect of the small boat, it is absolutely clear that in December of 2011, it was either ordered or agreed that Mr. Murphy owned the two boats having an estimated value of sixteen thousand five hundred dollars ($16,500.00). I have no doubt in saying that those boats included the accessories of those boats, based upon the statements of property filed in the Divorce proceedings. I'm absolutely satisfied that the terms and conditions of the – set forth for Mr. Murphy in order to get his goodies, clearly showed an attempt to frustrate the getting of the goodies and despite Mr. Murphy going through lawyers to play the safe route; so, that he wouldn't lose his ability to work Internationally and get involved with the police, based upon the express notice to him of what would happen if he took it into his own hands, he didn't attempt to go on the property. Because civil contempt, at least in some respects is quasi criminal, the obligation on Mr. Murphy, is to establish the elements of civil contempt beyond a reasonable doubt. The mens rea element of a civil contempt requires that it be shown that Ms. Layton knowingly or wilfully or deliberately did some act, which was calculated to result in the disturbance or interference with the process. It is for this Court to determine, as a question of fact, what the real intention of Ms. Layton was reading the affidavit and email exchanges. With respect to the 15 foot boat, it is clear that she knew that the vessel belonged to Mr. Murphy. She knew the terms and conditions she'd put on him with respect to his ability to get it and I'm satisfied those were intended to frustrate his ability to get those vessels. Even with that frustration her remedy was not to sell the boat. Her remedy wasn't to burn it. Her remedy wasn't to destroy it. She had no right to do that. There is no possible interpretation of the Corollary Relief Judgment and of the email exchanges that could give her the sense that Mr. Murphy had abandoned that 15 foot boat. …
>
> With regards to the 27 foot boat, which she fixed up and put in the water in August, which belonged to Mr. Murphy. She attempted to get rid of it again, with conditions, with regards to the trailer and the manner in which he was to pick it up, which included him not coming near her, before she moved – in November, which was about the same time as the last appearance in the Court. When she moved, the property – the boat was put in a location not disclosed. It was moved from the home, not across the street to Mr. Murphy's father's place, which by far was the easiest remedy and route to do it. It was absolutely incredulous to the Court that if people had been thinking clearly and not emotionally, that, that's what would have happened. It would have gone across the street and dumped safely on the other property. It wasn't. There is absolutely no basis in law that it was put in some secret storage location. That clearly demonstrates a mens rea to

> frustrate the ownership of that vessel. The exchange of emails clearly showed an intention by Mr. Murphy to retain ownership of that vessel. … Mr. Murphy, from all the evidence before me, attempted to have a mutual acquaintance, Mr. Bennett, make arrangements to get the vessel in July – the vessels in July. Accepting word for word, the affidavit evidence of Ms. Layton, her evidence makes no sense in terms of Mr. Bennett not getting the vessels with a tractor or otherwise. …
>
> It makes no sense if her intent was to comply with the Order – and the attempts by Mr. Murphy to get possession without personally dealing with her and going on her property, which she advised him he couldn't do with threat of the police and in light of the bad blood between the two of them and his ignorant language, was reasonable. In my view, there has not been compliance with the Order and there has been established beyond a reasonable doubt, a civil contempt.

[18] Lastly, the judge discussed the remedy and costs:

> I am – I have as a remedy – it's not a matter of punishment. It's a matter of enforcing the Order, civilly. I'm satisfied that Mr. Murphy's as ignorant as he was in his language to Ms. Layton, in at least one of the emails – as much as there was blood on the floor between them and I'm sure to their both discredit, neither one would have blinked if something had happened bad to the other, because clearly that's the impression that's given to the Court – clearly, that's the impression given to the Court, that the Court has to simply find a way to enforce the Order. One of the boats is gone. The other boat was delivered to some storage place. In my view, the least – the remedy that's going to cause the least possibility of trouble on a go forward basis, is not to seek to arrange some no man's land or some Tim Horton's or MacDonald's parking lot where there can be delivery by Mr. Urquhart [Ms. Layton's counsel] to Mr. White [Mr. Murphy's counsel] of a boat on a trailer, quite candidly, which sometimes lawyers get in the middle of and do just when their clients are in this kind of a mess, because this shouldn't have been here today. This should not have been here today and I could order something like that and try it, but the easiest remedy based on the Corollary Relief order, which place a value on both vessels, one of which cannot be delivered, is to order that Mr. Murphy will have credit for sixteen thousand five hundred dollars ($16,500.00) on his future payments of spousal support and that Ms. Layton, who already has dealt with the small boat and who has kept possession of the large boat, will own both those vessels and any accessories to those boats. …
>
> Costs are awarded in the amount of one thousand dollars ($1,000.00). I guess the easiest way for me to prevent any future dealings with this thing, is to say, it will be paid by credit on the spousal support obligation.

[19] On the appeal, Ms. Layton makes the following submissions.

[20] **First:** Ms. Layton says that the judge based his contempt ruling on an implied term of the CRO. She submits this offends the principle that the contempt must clearly contravene an unambiguous term of the court order. Her factum states:

> 39. The Appellant certainly had knowledge of this order and this specific term [clause 8(b)(iv) of the CRO]. However, the boats were in the physical possession of the Appellant at the time of issuance of the Order yet the Order does not require the Appellant to do anything to return the boats to the physical possession of the Respondent.
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> …
>
> 49. The Appellant did not take positive steps to return the boat to the Respondent's possession (ie. make her own arrangements for its removal) because the CRO did not require her to do so.
>
> …
>
> 51. It was not open to Warner, J. to read implied terms into the CRO finding that the Appellant was obliged to take certain action or that the trailer was included with the boats.
>
> 52. However, this is exactly what Warner, J. did – he inferred that the boats included the trailer and that the Appellant had a positive obligation to return the boats to the Respondent's possession.

[21] I disagree that the judge based his contempt ruling on an implied term of the CRO. It is true, the judge said that it would have made sense for Ms. Layton to have "dumped" the 27 foot boat across the street on the property of Mr. Murphy's father, instead of taking it to some undisclosed storage location. The judge also said he had "no doubt in saying that the boats included the accessories of those boats based on the statements of property filed for the Divorce proceeding".

[22] But the finding of contempt was not based on any implied duty of Ms. Layton to deliver the boat, and did not turn on title to the motors and trailers as accessories. Rather it was based on Ms. Layton's positive acts to contravene the express term of the CRO that Mr. Murphy "shall" have "possession" of the boats. Her contravention was not failure to deliver. Rather, Ms. Layton's clear contravention was: (1) her active sale or barter of the small boat to a third party, and (2) her active movement of the large boat to a hidden location. Those actions prevented Mr. Murphy from obtaining possession of the boats - with or without the motors and trailers - to which the CRO said he shall be entitled. Ms. Layton's

submissions treat this case as involving only nonfeasance, and virtually ignore her positive actions.

[23] **Second:** Ms. Layton says that there was no proof of the facts beyond a reasonable doubt. Her factum contends:

> 63. As stated by this Court in *Soper* and subsequently in *Godin*, the party alleging contempt has the burden of proof. In this case, the Respondent bore the burden of presenting clear proof sufficient to establish beyond a reasonable doubt that the Appellant had the requisite intent and violated the terms of the CRO.
>
> 64. The Appellant respectfully submits there was no evidence upon which the Honourable Justice could base a finding of contempt. Warner, J. based his decision upon the conflicting affidavit evidence of the parties without a hearing or cross-examination of the affiants.

[24] I respectfully disagree with the submission. I repeat - the judge's findings of contempt were based on: (1) the express provision of the CRO that Mr. Murphy "shall" have possession of both boats, (2) Ms. Layton's active sale or barter of the small boat to a third party, which made it impossible for Mr. Murphy to obtain possession of that boat, (3) Ms. Layton's active placement of the large boat in a hidden location, which prevented Mr. Murphy from obtaining possession of that boat, and (4) the judge's finding that Ms. Layton intended that Mr. Murphy not possess either boat.

[25] Mr. Murphy's affidavits supported those findings. So does Ms. Layton's Affidavit of November 19, 2012, which says:

> 16. The small boat was traded to a contractor by me in August for a $500 credit towards repairs on the house. …
>
> …
>
> 18. … The large boat has been winterized and is currently in storage.

Ms. Layton's counsel, Mr. Urquhart, acknowledged to Justice Warner that the location of the large boat has not been disclosed to Mr. Murphy:

> **THE COURT:** And it was placed in a place and was the location of that place disclosed to Mr. –
>
> **MR. URQUHART:** No. We haven't disclosed the location of the place. It's somewhere safe and it's been stored properly and winterized and so on.

[26] Ms. Layton's actions were premised on her assertion that Mr. Murphy had "abandoned" the boats. Her email of August 8, 2012, exhibited to her affidavit, says:

> You do not have a boat. You legally and willfully abandoned it after being given due notice, time frame and opportunity. …

[27] Justice Warner read to Ms. Layton's counsel, Mr. Urquhart, extracts from the parties' email exchange, then said:

> So, there clearly was no intent by him to abandon, right?
>
> **MR. URQUHART:** I would agree.

[28] The record from both parties fully supports the judge's findings that, beyond a reasonable doubt, (1) Ms. Layton's conduct breached the clear provision of the CRO that Mr. Murphy shall be entitled to possess both boats, and (2) Ms. Layton was aware of the provision in the CRO and had the required *mens rea*. The judge's findings satisfy the legal requirements for contempt, and involved no palpable and overriding error.

[29] **Third**: Ms. Layton says the judge erred with his choice of penalty or remedy. Her factum submits:

> 68. There was no basis and no authority for Warner, J. to re-write the terms of the CRO as a "penalty" for his finding of contempt. In fact, having decided the original terms of the CRO in February 2012 he was *functus* from now revisiting and reversing the terms of the same CRO without an application or appeal.

[30] Again I respectfully disagree. *Civil Procedure Rule* 89.13 says that a judge who issues a contempt order has a discretion as to the penalty. The judge "may impose … any other lawful penalty including … reparations [or] a fine payable, immediately or on terms, to a person named in the order". Justice Warner found that the value of the boats was $16,500. This was the valuation in the CRO, based on the evidence and statement of property at the divorce hearing. He concluded that Ms. Layton's conduct had deprived Mr. Murphy of that value. He was entitled to order reparations or payment of a fine of $16,500 by Ms. Layton to Mr. Murphy. Essentially, that is what he ordered, set off against the future spousal support payable by Mr. Murphy to Ms. Layton.

[31] The judge considered the possibility of arranging delivery of the large boat, to purge the contempt. He rejected that option because it would require a level of

coordination that these parties have shown they cannot muster. Given their combative proclivities, the judge foresaw "the least possibility of trouble on a go forward basis" from a simple set off of the value against spousal support.

[32] The judge's pragmatic approach makes sense to me. Even if the parties could agree on logistics, the transfer of the large boat potentially could generate a claim for repair or storage charges by Ms. Layton, perhaps countered by claims from Mr. Murphy for conversion, wastage or loss of use and specific performance of the execution or delivery of registration documents, which Ms. Layton has resisted. This might consume legal expense that exceeds the boat's value.

[33] The judge's choice of penalty, or remedy, showed a problem solving sensitivity to the context and circumstances of this matrimonial dispute. The judge made no error of law, or palpable and overriding error of fact. His exercise of remedial discretion did not result in a patent injustice.

Conclusion

[34] I would dismiss the appeal with costs of $1,000 payable by Ms. Layton to Mr. Murphy, which may be set off against spousal support.

Fichaud, J.A.

Concurred in:

Oland, J.A.

Bryson, J.A.