IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Peach v. Melnick, 2011 NSSC 220

Date: 20110616
Docket: 1201-058389
SFHD-030137
Registry: Halifax

Between:

Melvin Kyle Peach

Applicant

and

Beverly Gail (Tibbo) Melnick

Respondent

Judge: The Honourable Associate Chief Justice Lawrence I. O'Neil

Heard: April 20, 2011, in Halifax, Nova Scotia

Written Decision: June 16, 2011

Counsel: Philip Whitehead, for the Applicant
Gordon R. Kelly, Q.C. and Adrienne Bowers, for the Respondent

By the Court:

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Introduction

[1] The parties married August 5, 2000, separated in February 2003 and entered into a separation agreement dated April 4, 2003. The separation agreement was incorporated into the parties' Corollary Relief Judgment (the "CRJ") dated June 2, 2004. The parties were divorced by order, also dated June 2, 2004.

[2] Mr. Peach asserts that Ms. Melnick is in breach of clause 6(h) of the Separation Agreement/Minutes of Settlement. Clause 4 of the "CRJ" incorporates these Minutes of Settlement by reference. The text of the clause is, therefore, the same in both the Minutes of Settlement and the "CRJ." Clause 4 of the "CRJ" provides:

> 4. Insofar as the jurisdiction of this Court allows, the provisions of the Minutes of Settlement attached hereto as Schedule "A" entered into between the Petitioner and the Respondent, are hereby approved and incorporated into and form part of this Corollary Relief Judgement pursuant to *The Matrimonial Property Act*.

[3] Clauses 6(g) and 6(h) of the Separation Agreement/Minutes of Settlement dated April 4, 2003, provide:

> (g) Upon execution of the Quit Claim Deed in favour of Beverly, Beverly will pay Melvin the sum of $10,000.00 to compensate him for his interest in the home, subject to the following paragraph.
>
> (h) Although Beverly is assuming full ownership of the matrimonial home, she is doing so with the expectation that she may, by virtue of her employment, be required to relocate from the Halifax area in the next two to five years. Beverly agrees that, when she sells the matrimonial home, any proceeds of sale above $150,000.00 (after taking into account real estate commissions and any mortgage payout penalties) will be split equally by Beverly and Melvin.

[4] Ms. Melnick was not relocated by her employer. However, Ms. Melnick sold the former matrimonial home on June 13, 2007, for $215,000.00. She did not provide any "additional" funds to Mr. Peach, nor did she provide details of the sale to him.

Issues

[5] The court has been asked to decide (1) whether it has jurisdiction to consider Mr. Peach's claim for part of the proceeds from the sale of the subject home, i.e. whether a proper basis for the application was established; and (2) if so, whether clause 6(h) has been triggered, i.e. to decide the meaning and effect of the clause. As part of that analysis the court is required to consider whether parol evidence should be admitted.

History of Proceedings

[6] Mr. Peach filed a notice of motion on July 26, 2010, seeking leave to apply for an order of contempt against Ms. Melnick, as provided by current R.23.14 and R.89. He sought to have his application for leave to bring a contempt application heard *inter partes*. Initially, Mr. Peach was seeking a finding that Ms. Melnick was in contempt because she failed to provide details of the sale of the home to him.

[7] The matter was before me on August 19, 2010. Both parties were represented by counsel at that time. Standing to argue the contempt motion was granted to Mr. Peach.

[8] On August 19, 2010, the court directed that the requested financial information pertaining to the sale of the subject home be placed in a sealed envelope and the court adjourned the matter for evidence and argument to September 28, 2010.

[9] Mr. Peach received the requested information prior to September 28, 2010, making a hearing on that date unnecessary.

[10] On September 23, 2010, a second notice of motion was filed by Mr. Peach. It read *inter alia*:

> **Motion**
>
> Melvin Kyle Peach, the Applicant in this proceeding, moves for an order clarifying and giving directions pursuant to the Corollary Relief Judgment dated June 2, 2004. In particular the Petitioner seeks a decision from the court about

> the resolution of disputes concerning the disposition and proceeds of the matrimonial home.

[11] In support of the motion, reference was made to R.78.08(b) and (d) which state:

> 78.08 A judge may do any of the following, although a final order has been issued:
>
> . . .
>
> (b) amend an order to provide for something that should have been, but was not, adjudicated on;
>
> . . .
>
> (d) Set a deadline for complying with an order that does not set a deadline.

[12] On September 23, 2010, counsel for Mr. Peach filed a brief in support of the motion. Reliance on s.32A(d) of the *Judicature Act* was also asserted.

[13] Counsel for Ms. Melnick filed a pre-hearing brief on September 14, 2010, in anticipation of the hearing scheduled for September 28, 2010.

[14] The hearing scheduled for September 28, 2010, was rescheduled to January 24, 2011. It was ultimately held on April 20, 2011.

[15] On January 24, 2011, extensive discussion with counsel occurred on the issue of whether the court had jurisdiction to consider the merits of Mr. Peach's application. Counsel for Ms. Melnick objected to the application proceeding because the basis of the court's jurisdiction was not clearly defined by Mr. Peach and the body of law to be relied upon by him was unclear. It was argued that this placed Ms. Melnick in an unfair position when called upon to respond.

[16] The court asked counsel to clarify their positions on whether the court had jurisdiction to consider the merits of Mr. Peach's claim and to support their position with reference to authorities. The matter returned on April 20, 2011, and a hearing was held.

Issue One: Does the court have jurisdiction to consider Mr. Peach's claim for part of the proceeds from the sale of the subject home?

[17] As has been stated, Mr. Peach's original application was a contempt application. He was seeking information concerning the sale of the parties' former matrimonial home. He also sought a share of those proceeds based on his interpretation of the parties' separation agreement. Ms. Melnick ultimately provided the requested information but challenged Mr. Peach's right to proceed on the basis of improper pleadings.

[18] Mr. Peach amended his pleadings by removing the contempt relief and advancing his case as an application for declaratory relief. As stated, the hearing was held April 20, 2011.

[19] I am satisfied that Mr. Peach's application is properly before the court as an application for declaratory relief, i.e. a ruling on the meaning of clause 6(h) of the parties' separation agreement and "CRJ." I am also satisfied, given the history of this proceeding, that no prejudice to Ms. Melnick exists to having the court issue a ruling at this time. She has had ample time to consider the case advanced by Mr. Peach.

Issue Two: What is the meaning and effect of clause 6(h) of the parties' Separation Agreement? Should the court consider parol evidence to assist it in determining the meaning and effect of clause 6(h)?

[20] For ease of reference, I repeat the text of clauses 6(g) and 6(h):

> (g) Upon execution of the Quit Claim Deed in favour of Beverly, Beverly will pay Melvin the sum of $10,000.00 to compensate him for his interest in the home, subject to the following paragraph.
>
> (h) Although Beverly is assuming full ownership of the matrimonial home, she is doing so with the expectation that she may, by virtue of her employment, be required to relocate from the Halifax area in the next two to five years. Beverly agrees that, when she sells the matrimonial home, any proceeds of sale above $150,000.00 (after taking into account real estate commissions and any mortgage payout penalties) will be split equally by Beverly and Melvin.

[21] The separation agreement is dated April 4, 2003. Ms. Melnick sold the home on June 13, 2007, for $215,000. She continues to work in Halifax. She was not transferred out of Halifax.

[22] Mr. Peach is arguing that the first sentence of clause 6(h) is meaningless; it is surplusage. Ms. Melnick argues that, in fact, the sentence limits the meaning of the second sentence.

Parol Evidence Rule

[23] The court permitted the parties to offer *vive voce* and affidavit evidence but reserved the right to not consider it, should it decide that this is not a proper case for parol evidence.

[24] Extrinsic evidence can be admitted to resolve ambiguity in a contract. (See Fridman, *The Law of Contract*, 5th ed. Thomson/Carswell at p. 443 for a discussion of the governing law.)

[25] I am satisfied that clause 6(h) is ambiguous. The first sentence may simply be narrative or it may describe a pre-condition to the requirement for the parties to divide the proceeds from the sale of the home. It may simply be a statement of the most likely circumstance that may give rise to the need for Ms. Melnick to sell the home. Additional evidence may assist the court to reach a conclusion on the meaning and effect of clause 6(h). I will, therefore, consider the affidavit and oral evidence of the parties.

[26] Ms. Melnick testified that the clause was understood to only apply if she was transferred by her employer and required to sell the home as a consequence. Had that circumstance developed she anticipated a pay increase and her employer absorbing some or all of the costs associated with the sale of the home. The clause was acceptable to her on that basis, presumably because Mr. Peach had cooperated and was agreeable to her remaining in the home after the parties separated. She further explained that the objective was to divide any appreciation in the value of the home over the first five-year period, post separation, should she be transferred. She explained that $150,000.00 was the value of the home at the time of separation.

[27] Mr. Peach, in his affidavit (Exhibit 3), explains that the clause was designed to permit Ms. Melnick to remain in the home until she moved, at which time he would receive his additional equity. He explained that he was prepared to wait for the rest of his equity because money was tight for Ms. Melnick at the time of the parties' separation.

[28] Mr. Peach offered a document dated March 18, 2003, and initialled by Ms. Melnick as the first separation agreement, prepared by the parties and which agreement formed the basis of the subject separation agreement dated April 4, 2003.

[29] I am satisfied that the March 18, 2003, document does not reflect an agreement between the parties. Its authenticity is not established. Ms. Melnick testified that it is incomplete. Mr. Peach testified that it is in the nature of notes he provided to his lawyer as the basis of an agreement. The evidence does not permit me to conclude what the meaning and effect of this document is.

[30] It is clear that negotiations or communication between the parties continued because the Agreement dated April 4, 2003, is different from the document dated March 18, 2003.

Contra Proferentem **Rule**

[31] Mr. Peach agrees that the agreement in dispute was prepared on his behalf by his counsel and that Ms. Melnick was not represented by counsel (Exhibit 3, para. 15).

[32] The *contra proferentem* rule holds that language in a contract should be construed against the grantor or promisor under the contract. It is necessary to first find ambiguity in the contract before applying the rule. (See Fridman, *The Law of Contract*, 5th ed. Thomson/Carswell at p. 458 for a discussion of the governing law.)

Superfluous Language

[33] It is a basic principle of contract law that no word in a contract is to be treated as superfluous. (See Fridman, *The Law of Contract*, 5th ed. Thomson/Carswell at p. 457.)

Conclusion

[34] Absent a consideration of extrinsic evidence, I am satisfied that the obligation of the respondent to share certain proceeds flowing from the sale of the former matrimonial home arose if she relocated outside the Halifax area within five years.

[35] I have come to this conclusion because I am satisfied that meaning must be given to the first sentence of clause 6(h). I am not prepared to treat this language as superfluous. It is a sentence that modifies the second sentence of clause 6(h). The alternative interpretation would have the respondent subject to an obligation to share the proceeds of the sale whenever that would occur, whether five, ten or twenty years after separation. The parties are free to negotiate and conclude terms they find acceptable. However, that would be a very unusual requirement.

[36] My conclusion is also supported by application of the *contra proferentem* rule. The applicant prepared this contract. He had counsel and the respondent was self represented. Any ambiguity should be resolved against him, i.e. the first sentence of paragraph 6(h) modifies the meaning of the second sentence.

[37] A consideration of the extrinsic evidence offered in the form of affidavit evidence and parol evidence also supports the foregoing conclusion.

[38] I accept the explanation of the intent of the parties offered by the applicant. She was clear and she was consistent in outlining the rational for the clause. Her explanation is plausible and reflected the parties realities at the time. She did expect/hope to relocate and was prepared to share the financial benefits of that development with the applicant. The applicant had cooperated with her and assisted her to remain in the home following their separation.

[39] I have come to this conclusion, notwithstanding my belief that the respondent did attempt to withhold details of the sale of the home from the applicant. She was not forthcoming when he asked for details of the home sale or

even when he asked if the home was sold. Her conduct, in response to the applicant's inquiry is more consistent with his explanation than hers. However, given all of the evidence and for the reasons outlined, I conclude, on a balance of probabilities, that the respondent is not required to share the proceeds from the sale of the home. Clause 6(h) was not applicable when the home was sold.

[40] The claim of Mr. Peach is, therefore, dismissed.

ACJ