SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Newcombe v. Newcombe*, 2013 NSSC 183

Date: 2013-06-20
Docket: HFD No. 1201-66813
Registry: Halifax

Between:

Sharon Elaine Newcombe

Petitioner

v.

Kim Gregory Newcombe

Respondent

Judge:	The Honourable Justice Douglas C. Campbell
Heard:	June 11 and 13, 2013, in Halifax, Nova Scotia
Counsel:	Megan M. Roberts, for the Petitioner Eugene Tan, for the Respondent

By the Court:

[1] In the context of a divorce proceeding, the Petitioner (hereinafter referred to as "the wife") brought a motion for a declaration that there has been a settlement that binds the parties, which settlement is alleged to have been made on their behalf by their respective lawyers. The Respondent (hereinafter referred to as the "husband") argues, through counsel, that there was no settlement.

[2] Essentially, his argument developed as follows:

a) that he did not instruct his solicitor to settle, and if he did, he did so under duress from her;

b) that he did not appreciate that his discussions with his solicitor would constitute instructions by which she could bind him to a settlement; instead, he believed that his signature on a settlement agreement would be needed before he could be said to be bound;

c) that his lawyer had led him to believe that the Spousal Support Advisory Guidelines would bind him to a figure not less than the lower end of the scale so calculated and that such erroneous understanding should enable him to escape contractual ties;

d) that his then lawyer exceeded her authority by confirming settlement on the then known terms;

e) that the agreement was subject to a condition precedent and therefore cannot be binding upon the parties given that such condition had not been met at the time when the wife sought to enforce the agreement;

f) that in the event that there was a settlement, its terms were unconscionable and therefore it should be set aside.

[3] The issue before the court then is whether or not the discussions and correspondence between solicitors constituted a settlement which binds the parties.

[4] While there were previous solicitors involved, the relevant discussions and exchanges of correspondence through letters, phone calls and emails between Ms. Jacqueline Farrow (on behalf of the husband) and Ms. Megan Roberts (on behalf of the wife) constitute the alleged binding settlement.

[5] When it became clear that the husband wished to contest the existence of a binding settlement and when he suggested to his then solicitor that she had pressured him into a settlement, she withdrew from the matter and recommended that he obtain alternative counsel and that has occurred. She testified at this hearing.

[6] In her testimony, the husband's former solicitor confirmed that she was acting under authority from her then client to agree to a settlement and she confirmed that the draft court order reflects that settlement.

[7] The husband stated that he told his then lawyer that he felt he was being served up on a silver platter and that she was the server. She denied that he had said that to her and commented that such a remark would have caused her to immediately refuse to represent him further because of the lack of confidence in her that such a remark would indicate. I accept her evidence on that point.

[8] At the opening segment of this hearing, I commented that the fact of the husband having an incorrect impression of his legal obligation, if true, would be unimportant to my task and would at best be relevant in another forum if he should wish to complain about his representation by counsel. After hearing the evidence, it occurred to me that the husband's then solicitor seemed to have acted appropriately in every way and that includes her decision to withdraw. She kept her client fully informed of each negotiating step and advised him of the risks of going to trial.

[9] I offer this gratuitous opinion simply to clarify my remark made at the opening of the hearing (when I stated that, if the former client has a complaint about his representation, he could bring it in another forum) in that I then intended not to imply that such a complaint, if made, would have merit. I was merely making the point that unsatisfactory legal representation does not vitiate a contract that is otherwise binding.

[10] I have concluded that the exchanges of letters, emails and phone conferences represented a typical negotiation by fully instructed solicitors on both sides and resulted in a settlement to which both parties are bound.

[11] In so concluding I must note that the negotiation followed a fairly typical and standard process in that one lawyer would send a list of proposals on each of the many items in dispute; the opposite lawyer would reply, accepting certain items on the list, rejecting others and counter proposing a way of settling them. There

are a series of back-and-forth letters and emails until each of the narrowing lists became the subject of an agreement.

[12] The husband's former solicitor frequently used words in that correspondence that indicated that she purported to have or would first obtain authority from her client.

[13] The significant negotiations took place mainly during March 7 and 8, 2013 in the face of a court date set for March 18, 2013. Ms. Farrow's email to opposite counsel of March 7, 2013 stated: "I have discussed the proposal with my client and he is going to think about it tonight and let me know in the morning". The next morning, Ms. Farrow's email to the wife's lawyer opened with the words: "…my client has instructed me as follows…" Similarly, when replying again on March 8, 2013, Ms. Farrow stated in her email to the wife's lawyer: "I will get back to you on the other issues as soon as I have spoken to my client".

[14] Ms. Farrow testified that it has always been her practice to seek detailed and precise instructions from her clients on each and every move in a negotiation before offering his or her commitment. She testified that she did so in this case. I accept her evidence and I am supported in that by the expressions such as the above noted ones which recite or imply the fact that she had instructions or that she would get instructions before taking a position.

[15] Counsel for the husband argued that the husband's then solicitor had no written retainer and that the terms of her retainer were vague and that this contributed to his conclusion that she had exceeded her authority. In rejecting this contention, I note that both solicitors were retained to represent their respective clients to negotiate, with instructions from the client, issues arising from their separation. Each of them behaved exactly in accordance with standard practice by making offers and counter-offers after obtaining instructions by phone or otherwise from their respective clients. The absence of a written retainer does not affect my conclusion because she, in fact, acted only on instructions from her client.

[16] **The Law:** This issue of the binding nature of negotiations by counsel on behalf of a client is governed generally by contract law and more particularly by way of the law of agency which I see to be a subset of contract law. In contract law, there will be a binding commitment when there is an offer and an acceptance, as those words are defined by legal theory.

[17] More particularly, the lawyer is acting on behalf of a client as that client's agent. As such, the agent will be said to have been in a position to bind his or her

client when she has the actual authority to do so. But more to the point, she will also create a binding contract when she has the ostensible, meaning the apparent or implied, authority to do so.

[18] The theory of relying on mere ostensible authority is that the opposite side cannot be subjected to an undermining of a binding state simply because the contending party, by way of an agent, purports the existence of authority when it does not exist, as a reason to break the otherwise binding contract. This absence of authority is known only to the contender and must not ambush the opposite party. If the law were otherwise, parties would be unlikely to negotiate through their professional agent, because that would create great risk. The client might feel better off going directly to a trial. If an agent acts beyond her actual authority, the remedy is for the principal to sue the agent for that abuse; as opposed to avoiding the contract on which the opposite party is entitled to rely.

[19] I have concluded that there was both apparent authority and actual authority upon which Ms. Farrow operated and that she acted appropriately and within the scope of her actual authority.

[20] The Court of Appeal has recently commented in *Forrest v. Forrest* 2013 NSCA 15, that:

> Courts recognize the importance of encouraging settlement and settlement-oriented dispute resolution processes. Litigation is expensive and uncertain. It exhausts the resources of the parties and taxes those of the public who provide judges, courts and support staff. Less formal alternatives to trials should not be lightly cast aside. In this case, there were not extensive resources to fight about or with. A settlement was a sensible option.

[21] In *Langthorne v. Humphreys* 12011 NSSXC 44, Justice Rosinski reviewed a number of cases dealing with agency law and reached the following conclusion with which I agree:

> … even if a binding contract otherwise seems to exist, if an agent/lawyer who agreed to the contract on behalf of a client, did not have either actual authority or implied or usual authority, or apparent authority, then the client is not bound by his agent's unauthorized actions. The focus thus turns to what is "actual", "implied", "usual" authority and "apparent" authority.

[22] He discusses those terms and quotes Fridman in the Law of Agency (seventh edition 1996, Butterworth's Toronto Ontario) as saying:

> Apparent authority… is the authority which, as a result of the operation of the legal doctrine of estoppel, the agent is considered as possessing, in view of the way a reasonable third-party would understand the conduct or statements of the principal and the agent…. The representation, when acted on by the contractor by entering into a contract with the agent operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

[23] Counsel for the husband relies on the case of *Deluney v. Deluney*, 2004 NSCA 72. An annotation prepared by Professor Macleod is published above the published case at the above citation. I agree with his conclusion that, in the absence of actual authority, a principal will be bound by commitments made by his agent if it was done with apparent authority. On the question of whether an agreement so made should be set aside, the author states:

> Arguably, Deluney is an example of a case where a litigant acted promptly to set aside a settlement negotiated by her lawyer but that exceeded the scope of the lawyer's retainer.

[24] Earlier he stated :

> Whether a court will release a litigant from a valid settlement usually depends on whether the settlement exceeded the scope of the lawyer's actual authority.

[25] Given that I had concluded that counsel did not exceed her authority, and that in any event, she clearly exhibited apparent authority, the conclusion in that case does not govern my decision.

[26] **Analysis**: It is not irrelevant to note in this case that the husband had become very frustrated through the negotiations. This contributed to the stress that he felt.

[27] Impliedly, he seems to argue that instructions, if given, were given under duress. In my opinion, that frustration appears to have arisen from his personal philosophy that, even in the face of a 32 year marriage, he should not be expected to pay any spousal support (a position that is completely unsupportable) and that he should not be expected to suffer a division of his pension benefits (another position that is completely unsupportable). He testified that his friends at work confirmed his belief that men are victims in divorce cases and suffer inappropriate outcomes there. Indeed, his testimony was that after the discussion which is alleged to have represented his instructions to his lawyer to settle on specified terms, he thought about it overnight, spoke to his friends at work the next day and made the decision that he was not happy with the arrangement and was not intending to abide by it.

[28] Based on the foregoing, it is my opinion that the husband, after instructing his counsel to settle on then known terms, changed his mind in an effort to reverse what he felt was a bad deal from his point of view. Because of his philosophy regarding spousal support and pension division mentioned above, he apparently was never really accepting of his lawyer's advice which included the notion that he could do worse by going to trial.

[29] I have concluded that the husband was under no greater stress than most litigants would be with a trial date looming and the requisite need to make a choice between risking an unwanted outcome at trial and accepting a settlement recommended by a lawyer which will also provide an unwanted outcome. It is not reasonable to allow such self-induced stress to bear on the question of whether an agreement was reached.

[30] The husband admitted in evidence that he did not want to go to trial and I have concluded that he accepted the settlement to avoid trial and the next day attempted to reject that settlement. He cannot reject both the settlement and the trial.

[31] I will not take the time to review each piece of correspondence in the form of letters and email or the affidavit and other evidence of phone conversations. Suffice it to say that there was a piecemeal acceptance of individual items in dispute over time in that correspondence. Each time Ms. Farrow took instructions from her then client before agreeing on his behalf to any of those items. On occasion, she presented her client's position on instructions to do so even though it varied from her own advice to him.

[32] When it came to the final items of correspondence, Ms. Farrow obtained instructions from the husband by phone. By his own testimony, he accepts that his words to her were to the effect that, if that's the best he can do, "I guess I will have to live with it". He now takes the position that those words do not constitute his instruction to agree on his behalf.

[33] His counsel contends that those words are equivocal especially in the context of his above mentioned frustration. With respect, I disagree. Those words are clearly his way of saying that he has concluded, albeit reluctantly, that the then proposal is accepted. He thereby instructed his solicitor to acknowledge and implement that agreement. I accept Ms. Farrow's evidence that she had no doubt from that conversation (which she says was more detailed) that she was being instructed to accept the final details thereby making the exchange a binding settlement.

[34] In the face of this conversation with his then solicitor, the husband attempts to take the view that there would be no settlement until he signed his name on a document. With respect, this is an untenable position. He either knew or should have known that his instructions to his then lawyer that he would have to "live with it" was a direction which authorized his then solicitor to bind him to the then discussed terms (which are not in dispute). There is no other logical explanation for the process of offer, followed by the seeking of instructions, followed by a counter-offer, etc. There is no evidence to suggest that there was an expressed or implied term in the retainer that she could not speak for her client without his signature on an agreement.

[35] I must reiterate that even if those or his other words should not be taken to convey his instruction to his then lawyer that she had his actual authority to bind him to a settlement, it is clear that she, from the perspective of the wife's lawyer, had apparent or ostensible authority to bind him to the then settlement detail, given her words above noted confirming her instructions.

[36] Apparent authority is sufficient to bind the husband to the settlement that is outlined in the draft court order whether or not it derived from actual authority.

[37] **Condition Precedent:** Counsel for the husband argues in the further alternative that the proposed agreement was subject to a condition precedent and therefore cannot constitute a settlement since the condition has not been met. This is a reference to the wife's lawyer's email dated March 8, 2013 that sets out the settlement and then states that "the above is subject to confirmation that there are no other investments, assets etc. which have not been disclosed." He argues that in an email on March 13, 2013, from Ms. Roberts to Ms. Farrow which presented the draft settlement orders for review she reconfirmed the requirement that a sworn Statement of Property is required before the agreement is considered binding.

[38] In my opinion, when an agreement is recited to have been made conditional upon the happening of some event, the party who bears the burden of meeting that condition cannot rely on that failure to support his view that there is no agreement. If that were not the case, a person in the husband's position would always be able to avoid contractual obligations by his own unilateral refusal to meet the condition that has been imposed. The condition was for the benefit of the wife. If she chose to pursue enforcement of the agreement without the condition having been met, (which she has done here) she must be taken to have waived the condition.

[39] Counsel for the husband argues that the absence of compliance with the condition means that there is no contract. I disagree. On the facts, the wife must be taken to have waived her condition.

[40] I declare that there is an agreement and that there is no basis for setting it aside either because of duress, lack of actual authority or any other missing contractual ingredient. I have concluded that such settlement is accurately described in the draft order and is binding on the husband.

[41] **Setting aside:** Having concluded that an agreement was reached, it is nonetheless open for this court to conclude that such agreement was unconscionable and should be set aside for that reason. While this result was urged upon the court in the Respondent's brief, there has been no pleading that this should be done. I have concluded that I should not entertain such a claim in the absence of specific pleadings because that would take the Applicant by complete surprise and deprive her of the opportunity to bring evidence and argument against this conclusion.

[42] I do not have sufficient evidence to draw a conclusion about whether the settlement should be set aside if that remedy had been pleaded. I do note that the periodic support amount (which I understand to be the husband's most contentious issue) is the lower end of the range calculated by the Spousal Support Advisory Guidelines. I have no information or evidence as to whether this case would represent an exception to the use of those guidelines. I have no definitive evidence of the income differentials that would exist between the parties after the spousal support is accounted for at the agreed level. I have no sworn Statements of the husband's income or his tax returns. Indeed, I have no evidence of any facts that would bear on the question of the fairness of the outcome in general and the spousal support in particular. I therefore must not entertain any suggestion of unconscionability.

[43] If there had been a motion before me to set aside the agreement based on it being unconscionable, I would have started with the notion that a 32 year marriage is a fact which is consistent with a finding of entitlement and that the secondary nature of this wife's income earning history and her various absences from the workforce for various appropriate family-related reasons would have caused me to conclude that the quantity of support would not be small. I would have focused on the difference in the gross incomes of the parties, access to a sharing arrangement of expenses with another income-earning party, and the general balancing of the reasonable needs of the recipient and the ability to pay of the payor. The Spousal Support Advisory Guidelines would be noted but may or may not be helpful in the

quantification process, depending upon the evidence. To the extent that those guidelines would have been found to be relevant, it would not be ignored that the absolute lowest number presented by that calculation was the agreed amount.

[44] **Implementation:** Counsel for the wife may forward the uncontested Divorce paperwork in the usual form along with the draft Corollary Relief Order, Divorce Order and Pension Division Order directly to my attention for signature and issuance.

[45] **Costs:** In the event either party wishes to address the court on costs for this matter, that party shall within 30 days of the date of this decision, contact the scheduling department of the court and arrange for a half-hour appearance on my docket for that purpose. If that arrangement is not made within those 30 days, I will conclude that neither party seek costs, in which case this decision shall be interpreted to have concluded that there shall be no costs to either party.

CAMPBELL, J.