

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Luker v. Bailey, 2013 NSSC 305

Date: 20130930

Docket: SFSNMCA 084516

Registry: Sydney

Between:

Michelle Paulyn Luker

Applicant

v.

John Adam Bailey

Respondent

Judge: The Honourable Justice Darryl W. Wilson

Heard: August 15, 2013, in Sydney, Nova Scotia

Written Decision: September 30, 2013

Oral Decision: August 15, 2013

Counsel: Jennifer Anderson, for the Applicant
John Bailey, not present

By the Court:

[1] The Applicant, Michelle Luker, and the Respondent, John Bailey, began a relationship in September, 2006. They had been living separate and apart since October 10, 2011.

[2] On July 3, 2008, the parties purchased property located at 8 Campbell Street, North Sydney, NS, as joint tenants. An appraisal dated May 9, 2013, valued the property at \$103,000.00. There is a mortgage encumbering the property with an outstanding balance on July 16, 2013, of \$77,597.38.

[3] The Applicant has not lived in the property since the date of separation in October, 2011. The Respondent was employed with the Canadian Armed Forces and living in Kingston, Ontario at the time of the parties separation in October, 2011. In August, 2012, the Respondent quit his job and returned to Cape Breton to take up residence in the jointly owned property in North Sydney. The Applicant was residing with her parents at their home in North Sydney.

[4] When the parties were together mortgage payments for the home were automatically taken from a joint chequing account in which both parties had contributed funds. This arrangement continued after separation until August, 2012, when the Respondent stopped contributing to the joint chequing account and took up residence in the home.

[5] At the time of separation the joint chequing account was in overdraft in the amount of \$236.93.

[6] After August, 2012, the Applicant contributed funds from her personal savings and chequing accounts into the joint chequing account to cover the mortgage payments.

[7] As of July, 2013, the joint chequing account was in overdraft in the amount of \$5,652.13, an increase of \$5,415.20 since the date of separation. The Applicant states that she has not contributed to the increase of the overdraft amount and this has been entirely the result of the Respondent's use of this account for his own benefit.

[8] The parties also had a joint line of credit during their relationship which was used by each of them for personal expenditures until separation. The Applicant has not used the joint line of credit since the date of separation. She has made payments of \$6,264.60 against the line of credit since the date of separation. The Respondent has not made any payments on the joint line of credit since their separation. Following separation the Respondent withdrew \$2,000.00 from the line of credit for his own use which has not been repaid.

[9] In addition, the Applicant was required to pay \$250.00 in January, 2013, to bring the joint line of credit into good standing.

[10] The present value owing on the joint line of credit is \$19,298.15. The Applicant claims the Respondent is responsible for \$14,781.08 which represents half the present debt plus the \$2,000.00 withdrawal made by the Respondent in August, 2012, plus fifty percent (50%) of her payments on the line of credit since separation.

[11] Each party acquired a motor vehicle while residing together and each co-signed the loan for the purchase of the other's vehicle. Neither made payments on the other's loan. The parties agreed to re-finance the vehicle loans after separation. The Respondent re-financed her loan but the Respondent did not. The Respondent did not make the necessary payments on his vehicle loan following separation. The Bank of Nova Scotia repossessed the Respondent's vehicle and the Applicant was given notice of the bank's intention to sell the vehicle pursuant to the *Personal Property Security Act*. The amount collected at auction from the sale of the vehicle was \$10,003.25 resulting in a deficiency on the loan of \$20,578.63. The bank is seeking repayment of the entire amount from the Applicant with accrued interest.

[12] The Respondent has sold some of the household contents jointly owned by the parties during their relationship.

[13] The Applicant seeks a partition in sale of the jointly owned property pursuant to the **Partition Act**, R.S.N.S. 1989, c. 333 s. 4 - 5:

Land subject to partition

4 All persons holding land as joint tenants, co-parceners or tenants in common, may be compelled to have such land partitioned, or to have the same sold and the proceeds of the sale distributed among the persons entitled, in the manner provided in this Act.

Right of action

5 Any one or more of the persons so holding land may bring an action in the Trial Division of the Supreme Court for a partition of the same, or for a sale thereof, and a distribution of the proceeds among the persons entitled.

[14] The Applicant also seeks a determination as between the parties of each parties' share of joint debt accumulated during their relationship as well as costs.

[15] The Respondent was not present at the Hearing. The Applicant's evidence was the only evidence received.

[16] The Application was filed on January 21, 2013. Both parties appeared at an Organizational Pre-Trial on April 30, 2013, without counsel. The Respondent requested time to retain counsel as did the Applicant. Both parties were directed to return to Court for a further Organizational Pre-Trial with counsel on May 27, 2013. The Applicant appeared without counsel. The Respondent did not appear or notify the Court that he would not be present. He did not advise the Court if someone was acting on his behalf.

[17] The Court fixed a Trial date for August 15, 2013, and a further Pre-trial for June 24, 2013.

[18] The Respondent was notified and appeared at the Pre-trial on June 24, 2013, without counsel. He advised that he still wished to retain counsel. He was directed to file a Response Affidavit to the Affidavit filed on behalf of the Applicant if he was going to participate in the Hearing.

[19] On August 14, 2013, the Court received a faxed, typed note from the Applicant sent from what appears to be the Days Inn Calgary. The note reads as follows:

“To whom it may concern.

I am writing this in regards to not being able to make it to court on Aug 15th because I am in Calgary working a camp job. I found out about this work position late on Friday the 9th of August and would have to leave on the 11th of Aug. I could not turn down this work due to the fact that I had no income and was in an extremely desperate position. I do fly home on 25 Sept and will be home for 4 days until I fly out for my next 6 week rotation. I am truly sorry for missing my court date and would not have if I had any other option. I hope you can understand that I was completely desperate and did not want to lose out on this job for I would not have been given another opportunity and had already waited so long. Thank you for your time.”

[20] The Respondent had not taken any action to retain counsel or to file the necessary documents as directed by the Court. He didn't advise the Court or the Applicant before leaving for Calgary that he would be unable to attend court. He waited until he was in Calgary and the day before the hearing to request an adjournment.

[21] The Applicant opposed the adjournment and advised the Court that the matter was urgent. The matrimonial home was unoccupied. It was damaged as a result of the Respondent's vehicle exploding which lead to the house catching on fire. The home was exclusively occupied by the Respondent at the time of this accident. The police are investigating. The home insurers are prepared to advance funds to the Applicant to repair the home if she obtains title to the property.

[22] The Court denied the Respondent's request for an adjournment and the hearing proceeded in his absence.

CONCLUSION:

[23] The jointly owned property has an appraised value of \$103,000.00 with an outstanding mortgage balance of \$77,597.38 as of July 16, 2013. The equity in the property at the time of the hearing is \$25,402.62.

[24] Each party is entitled to one-half (½) of the equity in the property. The Respondent, John Adam Bailey's, interest in the equity of the property is \$12,701.31.

[25] The Applicant, Michelle Luker, shall receive credit of \$9,189.06 for payments she made on the mortgage and taxes from August, 2012, to present. She is entitled to credit for the full amount of the payments since John Adam Bailey exclusively occupied the home without making any contribution to the mortgage or taxes.

[26] The Applicant, Michelle Luker, is also entitled to a credit of \$3,132.30, which is fifty percent (50%) of the payments she made on the parties joint line of credit since the date of separation.

[27] When these credits are applied against the purchase price for the Respondent's interest in the property, the Applicant owes the Respondent \$380.00 for his share of the equity of the home.

[28] Ms. Luker is entitled to credit for any payments made subsequent to the hearing date before the Order is taken out which will likely result in no proceeds in favor of Mr. Bailey.

[29] Mr. Bailey shall forthwith execute a Quit Claim Deed releasing his interest in the property and sign such document releases as may be necessary to release his interest in the property. If he fails to do so within ten (10) days of the date of this Order, a Sheriff shall execute the Quit Claim Deed to transfer John Adam Bailey's interest in the property to Michelle Luker. In addition, if the Respondent does not execute other documentation necessary to release his interest in the property including documentation required to release his interest under the home insurance policy, a Sheriff is authorized to execute such documentation in his stead.

[30] The Applicant, Michelle Luker, shall assume sole responsibility for the payment of the mortgage encumbering the property.

Division of Joint Debts:

[31] As between the parties, the Respondent, John Adam Bailey, shall be responsible for the following share of the joint debts -

The joint chequing account in the amount of \$5,415.20 plus any applicable interest. This amount represents the present amount of the overdraft (\$5,652.13) for which the Respondent is solely responsible less the amount of the overdraft before separation (\$236.93) and any applicable interest. The Applicant is authorized to close out this account once the balance is paid out.

The joint line of credit in the amount of \$11,899.08 plus any applicable interest. This amount is determined by dividing the current amount of \$19,298.15 by two (2) and adding \$2,000.00 for the Respondent's withdrawal after separation as well as a \$250.00 payment made by the Applicant to bring the account into good standing and any applicable interest. The Applicant is authorized to take steps to close the account once the balance is paid out.

Respondent's vehicle loan - the deficiency arising following the repossession and sale of the 2011 Mitsubishi Eclipse in the amount of \$20,578.63 and accruing interest daily. Mr. Bailey is responsible for the entire amount of deficiency in light of the fact that Ms. Luker had taken over the debt obligations associated with her vehicle which had been a joint debt during the parties' relationship.

[32] If the Applicant is called upon to pay the Respondent's share of the joint debt, she may return to court for a determination of the amount of the debt owed by the Respondent to her.

[33] The Applicant shall retain the remaining household contents given that the Respondent has already removed his share of the contents. The necessary enforcement provisions can be included.

[34] The Respondent shall pay the Applicant costs of \$1,500.00 plus fifty percent (50%) of the cost of the house appraisal.

J.