IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: Rayner v Smith, 2010 NSSM 6

Date: 20100202
Halifax Claim Number: 308841

Between:

Nicole Lynn Rayner
Claimant

v.

Mark Lornton Smith
Defendant

Adjudicator: W. Augustus Richardson, QC

Heard: September 22, 2009 in Halifax, Nova Scotia.

Appearances: Nicole Rayner, Claimant, for herself
Mark Smith, Defendant, for himself

By the Court:

[1] This matter raises a vexing question of jurisdiction: what is the relationship between the multitude of claims and counter-claims that arise when a common law relationship dissolves and sections 9(a) and s.13A of the *Small Courts Act*, RSNS 1989, c.430, as amended, which together:

a. limit the court's jurisdiction to claims of $25,000.00 or less, and

b. prohibit the division of a claim into two or more claims "for the purpose of bringing it within the jurisdiction of the Court."

[2] In other words, when a common law relationship dissolves is there one "claim"–one arising from the relationship itself–or are there as many separate and distinct "claims" as there are individual contracts or torts committed during the course of the relationship? Moreover, how are the various claims to be dealt with–piecemeal, or only in the context of one "case" where the entire history of the relationship can be considered.

[3] For reasons set out below it is my opinion that in cases and claims arising out of the breakup of a common law relationship,

a. more than one individual claim for no more than $25,000.00 can be heard, so long as each claim is separate and distinct, and

b. as a practical matter all such claims should be heard at the same time.

The Facts

[4] I heard the evidence of the claimant Nicole Rayner, the defendant Mark Smith and of the defendant's father, Mark Smith.

[5] This claim has its origins in a common law relationship between the claimant and the defendant. The relationship began in October 2006 and ended in March 2009.

[6] Before the relationship began in 2006 Ms Rayner had a young daughter and owned a duplex. The duplex was subject to a mortgage.

[7] In July 2006 Ms Rayner and Mr Smith began to co-habit. At this time Ms Rayner was working at Staples as a retail clerk. Mr Smith was working for his father's small construction and debris removal business.

[8] About this time Ms Rayner says that she and Mr Smith decided to purchase a 30 foot camper. (Mr Smith says that it was her idea and her decision, though he admitted they all used the campber.) Because Mr Smith's credit history was poor the loan they needed to purchase the camper was in her name alone. It totaled $29,341.52. They used the camper for two years, until they separated. Ms Rayner could no longer afford to carry the loan, so she returned the camper. It was sold at auction, leaving a balance of $18,007.21 owing by her to the bank (the "Camper Debt").

[9] Mr Smith's evidence on this point was that they used to go camping with a friend of Ms Rayner. Her friend told her that they should get a camper. He told Ms Rayner that there was "no way they could afford it" and that he "couldn't afford it." Notwithstanding his protests Ms Rayner and her friend went to a camper dealership, and found one they liked. She called him and

he still protested that they couldn't afford it. She said that she could get a loan for only $200 a month. He said "go ahead and do what you want."

[10] In November 2006 Ms Rayner and Mr Smith spoke about a house Mr Smith was building on land owned by his father. Ms Rayner says that the intent at the time was that the land would be deeded to Mr Smith by his father. She says Mr Smith told her that if she wanted to move into the house once it was ready she would have to contribute money to the completion of the house.

[11] In March 2007 she says they took out a large loan in the amount of $35,000.00 to get the house ready for occupancy. She says the money was used to buy a new furnace, flooring, and "all the big stuff" by way of appliances.

[12] The money was also used, according to her, to buy a dump truck for Mr Smith. He had been driving a truck for his father at the time, but wanted to strike out on his own. He needed to buy a truck, and could get one for $13,000.00. They then decided to increase the loan "by $10-$15,000 for the rest of the house."

[13] The loan was taken out in her name (the "Personal Loan"). She says that it was originally going to be in both names, but because Mr Smith had no credit rating it ended up having to be in her name alone.

[14] It remains the case however that the loan of $35,000.00 was used (accordingly to her) to:

a. purchase a dump truck which cost $13,000.00 and which was to be used by Mr Smith to start his own business;

b. purchase a furnace; and

c. purchase flooring and appliances and other items that went into finishing the house they were moving into.

[15] The payments came out of their joint account.

[16] They moved into Mr Smith's house about June 2007.

[17] Ms Rayner and Mr Smith got engaged in October 2007. Some time later the dump truck that Mr Smith had purchased burnt. He then purchased a replacement truck, with his own money.

However, Ms Rayner paid for the commercial insurance on the truck, to the tune of $741.33, for a period of time (the "Insurance Claim"). Mr Smith agrees that he owes the money to the insurance company, but says that it has nothing to do with Ms Rayner.

[18] In April 2008 Ms Rayner was the owner of a Honda Civic. She owned it free and clear. Ms Rayner wanted a new car in April, but her credit at that point was "maxed out." Mr Smith's credit was better at this point, so he agreed to put the loan in his name, in part because it would allow him to re-establish his own credit history. Ms Rayner and Mr Smith accordingly used the value of Ms Rayner's Honda Civic as a trade in worth $8,200.00 plus tax towards the value of a new Ford SUV. The Ford SUV was $34,784.96 (including the cost of financing). They purchased the SUV in his and her name, though the bank loan was in his name only (the "SUV Trade In").

[19] In May 2008 Ms Rayner was terminated from her job at Staples. She was given a lump sum severance payment of $30,000.00. Just before this she had borrowed $1,400.00 from a pay-day loan company to purchase a pool in her name to be used primarily by her daughter. She says that when she and Mr Smith later separated she did not get the pool back, and she wants its value or its return (the "Pool Claim").

[20] Mr Smith's evidence on this point was that he himself was the one who paid for the pool, in cash. He says as well that when they separated he had told Ms Rayner that she could take "whatever she wanted." She didn't take the pool, and he discovered that it had somehow been slashed (whether intentionally or inadvertently) and it now leaked.

[21] As noted, Mr Smith's truck (the one Ms Rayner says was purchased out of the proceeds of the Personal Loan) had burnt. Ms Rayner says that they used $26,000.00 of the severance payment to purchase a truck to replace the one that had burnt.

[22] Ms Rayner did not work from June 2008 until October 2008.

[23] Ms Rayner and Mr Smith separated in March 2009. At the time of their separation there was $29,683.00 owing on the Personal Loan. Ms Rayner claims half that amount from Mr Smith.

[24] With respect to the SUV Trade In, she claims the trade in value of her Honda Civic ($9,266.00) on the grounds that he had the benefit of the trade in when the Ford SUV was purchased–and that since his sister is now using the Ford SUV Ms Rayner should be compensated for the trade in value.

[25] With respect to a bed, Ms Rayner claims the return of what she says is her daughter's bed frame. Mr Smith says that at the time of their separation there were three beds in the house. He told her to take whatever she wanted, and when she did she left only one bed frame. She took everything else, including two beds, the stove and fridge, sofas, dishes, tables and chairs, drapes and curtains–as he said, "everything" except one bed frame, which he now uses.

Procedural History

[26] On or about March 20, 2009 Ms Rayner filed two claims against Mr Smith, as follows:

a. this one, for $11,559.00 for $9,266 for the value of the car she had traded in, and for a trampoline, and pool; and

b. Small Claims No. 308843, for $25,000.00 or, in the alternative, delivery of a 1997 Ford Dump Truck bearing VIN number 1FTYS96KOVVA32631.

[27] (The claim in respect of the Ford Dump Truck is in respect of the $26,000.00 of Ms Rayner's severance that was used to pay for the truck.)

[28] Both claims came on before Adjudicator Casey in Dartmouth, Nova Scotia on May 5, 2009. Adjudicator Casey referenced s.9A of the *Small Claims Court Act* and concluded that the court lacked jurisdiction to hear the claims because Ms Rayner was, in effect, splitting her claims, which was prohibited by s.9A of the *Small Claims Court Act*. Both matters were adjourned. Ms Rayner apparently told Adjudicator Casey that she would be commencing an action in the Supreme Court of Nova Scotia.

[29] Ms Rayner advised however that when she went to the Dartmouth Small Claims court the next day she was told that she could still bring her claims in Small Claims Court so long as she kept them separate.

[30] Ms Rayner accordingly separated the claims by brining them on different days.

[31] She brought Small Claims Court No. 308843 on before Adjudicator Slone on July 7, 2009. For some reason the defendant did not appear, and she obtained a judgment requiring the

delivery to her of the Ford Dump Truck plus costs. (Mr Smith advised at the hearing before me that this order was under appeal.)

[32] She then brought the within claim on before me on September 22, 2009. It was during the course of the hearing that I learned of the procedural history.

The Claims

[33] Out of this relationship Ms Rayner makes the following claims:

a. the Personal Loan claim, being 50% of the loan taken out to finance the truck and household effects, for a total of $14,841.00;

b. the Camper Loan claim, being 50% of the loan taken out for the camper, for a total of $9,003.00;

c. the Ford SUV Trade In claim, being the value of trade in on her Honda Civic, in the amount of $9,266.00;

d. $1,694.00 for the pool, or its return;

e. $741.33 in respect of the premiums she paid for the defendant's dump truck insurance; and

f. the return of the bed frame.

Discussion

[34] Ms Rayner's claims all arise out of a common law relationship. As was noted by Adjudicator Slone in *Cook v Orr* 2008 NSSM 23 at paras.4-6, disputes arising out of the break up of common law relationships are governed by basic contract and property law principles, not by the *Matrimonial Property Act*. The Small Claims Court may hear such disputes so long as they do not exceed the monetary jurisdiction of the court.

[35] There are a number of difficulties in dealing with such claims.

[36] The first difficulty revolves around the attempt to "account" for the multitude of economic contributions that are made by individuals to the "common account" during the course of the relationship.

[37] When people join together in a common law relationship they often merge their finances. The income and expenses of one become the income and expenses of both. As well, the way in which that common burden is shouldered varies from couple to couple. In one all income and expenses may be tracked and shared on a 50/50 basis; in another, on a pro-rated basis; and in a third, one partner may pay all the basic living expenses while the other contributes to the joint retirement savings. The fact then that a loan is taken out in the name of one does not mean necessarily that it is for the benefit of that person alone–it may be for and often is for the benefit of both.

[38] Specific agreements to share expenses or to contribute to the purchase or property are enforceable as contract. On the other hand, gifts of property that are made with no expectation of return or repayment cannot be turned into agreements to repay by subsequent regret in the event that the relationship falls apart: see, for e.g., *Cook v. Orr*, *supra*, at paras 8 and 14. The difficulty lies in distinguishing between the two. That task is not an easy one, especially given that contributions to the common good (what are, in effect, gifts) are "precisely the kind of thing people do for each other when they are in a caring relationship:" *Cook v. Orr*, per Adjudicator Slone at para.14.

[39] The second difficulty, which springs from the first, has to do with how best to determine whether particular transactions are "gifts" or "agreements to contribute." Something which on its face may appear to be a gift may in context of the entire history of the relationship be an "agreement to contribute,"–or *vice versa*. Alternatively, something that started out as an "agreement to contribute" may over time have become a gift. For an Adjudicator to hear one claim in isolation deprives him or her of the ability to consider the claim in the context of the relationship that gave birth to it.

[40] The third difficulty is that notwithstanding the fact that the parties are in a "common law" relationship it remains the case that they have chosen not to marry. Marriage by law legitimizes the notion of the common good. It signals an agreement to be bound by the provisions of the *Matrimonial Property Act*. It thereby ensures to some extent that financial burdens are *prima facie* assumed to be joint burdens and hence joint liabilities. Those who do not marry cannot rely upon that assumption. For whatever reason they have chosen not to be governed by the same law

that governs married couples: see, in general, *Attorney General of Nova Scotia v. Walsh* [2002] 4 SCR 325 at paras.35, 40, 43, 49. And it means as a result that a common law partner who decides unilaterally to incur a debt cannot automatically assume that the burden of that debt will be shared by his or her partner, even if that partner takes some advantage from the debt. Whether or not the burden was jointly assumed will have to depend upon the facts of each case.

[41] Finally, there is the issue of s.9 of the *Small Claims Court Act*. The section provides that a person “may make a claim under this Act

a. seeking a monetary award in respect of ***a*** matter or thing arising under ***a*** contract or ***a*** tort where the claim does not exceed $25,000.00 ...

b. [not relevant]

c. requesting the delivery to the person of specific personal property where ***the*** person property does not have a value in excess of $25,000.00; ***or***

d. [not relevant].

[42] The use of “or” between s.9(c) and s.9(d) means that the subparagraphs of s.9 are to be read disjunctively. That, and the fact that the subparagraphs refer to “***a*** contract” or to “***specific*** personal property,” indicate to me that the Legislature intended the $25,000.00 limit to apply to specific and particular contracts, torts or pieces of personal property. In other words, so long as each was separate and distinct a claimant could launch a claim on such contracts even if the total of all such contracts exceeded $25,000.00.

[43] So for example if there were three joint loans, each for $25,000.00, taken out over the course of a relationship, into which one partner had also had brought a family heirloom worth $25,000.00, then in my view s.9 would permit the following:

a. one claim in respect of each loan, and

b. one claim in respect of the family heirloom.

[44] The fact that the total value of four claims exceeded $25,000.00 would not bar the individual claims ***so long as*** each contract was separate and distinct from the other.

[45] The trick of course will be to distinguish between those contracts which are separate and distinct and those which are part and parcel of a larger, ongoing relationship in which there was a "basic agreement" that loans taken out would be either gifts or equally shared.

[46] As a result I am driven to the conclusion that I must disagree, with the greatest of respect, with the decision of Adjudicator Casey in this matter. In my opinion there was nothing to bar the hearing of the two actions even though they arose out of the same nexus or relationship; and even though taken together they totaled more than $25,000.00. Indeed, as a practical matter, there is everything to support a conclusion that ***all*** claims arising out of the breakup of a common law relationship ought to be heard at the same time. If all such claims are heard together it becomes easier for the Adjudicator to distinguish between "gifts" and "contracts"–and to do justice to the overall history of the dealings between the parties.

[47] In this case then I have some concern about the fact that the two actions were separated. However, on the evidence presented to me I am satisfied that the other action–the Ford Dump Truck action–was for a separate and distinct agreement. That being the case I can hear the other claims that are brought in the instant action.

The Personal Loan Claim

[48] I am satisfied on the evidence that the Personal Loan claim is made out. The money was borrowed by Ms Rayner and used to benefit both of them. At least some of it went into Mr Smith's house, the benefit of which he retains and continues to use. I am also satisfied on the evidence that it either went into the purchase of his truck, or made possible his purchase of it by relieving him of other financial obligations that he would otherwise have had to meet. I accordingly allow that claim for $14,841.00.

The Camper Loan Claim

[49] I am satisfied on the evidence that the camper (and the loan necessary to purchase it) was the result of a decision made unilaterally by Ms Rayner. Mr Smith told her at the time that they could not afford to purchase a camper and that they could not afford a loan to purchase one. When she insisted on going ahead he, in effect, said that it was her decision but not his responsibility. In this case I am satisfied that the camper (and the debt necessary to purchase it)

was a personal decision of Ms Reyner. Mr Smith did not agree to share the burden. She cannot in my view impose the consequences of her decision on Mr Smith. This part of the claim must fail.

The Ford SUV Trade In Claim

[50] In my opinion the decision to use the value of the Honda Civic as a trade a gift by Ms Reyner towards what she thought was the common good at the time. It was her car, and the car that was to be purchased was to be used by her. Mr Smith assumed the loan payments for the car. The fact that the relationship subsequently crumbled cannot change what was a gift into a loan by Ms Rayner to Mr Smith. This part of the claim must also fail.

The Pool and Bed Frame Claims

[51] Ms Rayner did not dispute the fact that on separation she retrieved most if not all of the furniture from Mr Smith's house. She also did not dispute that he said "take what you want." In my opinion on the facts she relinquished whatever claim she might have had to the bed frame. She converted it to a gift.

[52] The same reasoning applies in my view to the pool.

[53] These two claims must accordingly be dismissed as well.

The Insurance Premium Claim

[54] As I understood the evidence the insurance on Mr Smith's truck was in her name on her policy. That being the case she was liable for the premium in respect of insurance for Mr Smith's benefit. The claim for $741.33 must accordingly be allowed.

Conclusion

[55] For the reasons set out above I will make an order:

a. allowing the Personal Loan and Insurance Premium claims, and

b. dismissing the other claims.

Dated at Halifax, this 2nd day of February, 2010

Original:	Court File	)
Copy:	Claimant	)
Copy:	Defendants	)

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W. Augustus Richardson, QC
ADJUDICATOR