

In the Court of Appeal of Alberta

Citation: Kaur v Bains, 2022 ABCA 404

Date: 20221208
Docket: 2201-0098AC
Registry: Calgary

Between:

Sukhbir Kaur

Appellant

- and -

Sukhbir Singh Bains

Respondent

The Court:

**The Honourable Justice Elizabeth Hughes
The Honourable Justice Bernette Ho
The Honourable Justice Anne Kirker**

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice D.A. Labrenz
Dated the 14th day of March, 2022
Filed on the 22nd day of April, 2022
(Docket: 4801-191102)

Memorandum of Judgment

The Court:

Overview

[1] The husband and wife were married in 2014 and separated in 2021. There is one child of the marriage. They jointly owned the matrimonial home, which the wife continued to reside in with the child after separation.

[2] At an early intervention case conference on November 30, 2021, the parties entered into a Consent Order that provided that the wife would purchase the matrimonial home for \$720,000 subject to meeting certain deadlines: December 21, 2021, to provide the husband with proof of refinancing, and January 31, 2022, to close the transaction. The Consent Order provided that if the wife failed to meet the December 21, 2021, deadline, the matrimonial home would be listed for sale.

[3] A child support order had been granted the day earlier, on November 29, 2021, awarding the wife child support and retroactive arrears, and directing the sharing of section 7 expenses in proportion to income (Child Support Order).

[4] The wife was unable to obtain the refinancing and close the transaction by the deadlines contemplated in the Consent Order for several reasons including that she needed a filed copy of the Consent Order and Child Support Order. When she obtained financing and sent closing documents to the husband's lawyer on February 15, 2022 for a proposed closing in March, the husband refused to sign the required documents.

[5] The wife brought an application on an urgent basis seeking an order to transfer the home without the husband's consent. She relied upon a series of communications between counsel for the parties and asserted that there was an agreement between counsel to extend the deadlines outlined in the Consent Order. The chambers judge disagreed and dismissed her application. She now appeals.

[6] For the reasons set out below, the appeal is allowed.

Background

[7] Below is a detailed chronology of the exchange of communications between counsel for the parties and between the husband and his counsel. Complicating this matter is that two lawyers at the same firm were acting on behalf of the husband (AH and MD), and only one of them (AH)

was party to a conversation that occurred on December 3, 2021. Further, the husband retained new counsel sometime in February 2022.

[8] The wife's evidence is that on December 3, 2021, her counsel had a telephone conversation with AH wherein they agreed to treat the December 21, 2021 deadline in the Consent Order as flexible as long as the wife was taking steps to submit her refinancing application.

[9] There is a letter in the materials from her counsel, dated December 3, 2021, and addressed to both AH and MD, that appears to document this conversation. As set out in this letter, the wife's counsel learned that the bank would require a separation agreement that had yet to be drafted, as well as the "List and Sell Order", so more time was needed to obtain refinancing. It is unclear from the record when the December 3, 2021 letter was first sent to the husband's counsel, however because the letter indicates that the endorsed Consent Order was enclosed for filing and the Consent Order was filed by AH and MD on December 21, 2021, it seems that the December 3, 2021 letter was sent by the wife's counsel prior to December 21, 2021, and then re-sent on January 6, 2022.

[10] The filed Consent Order, described as the List and Sell Order in the December 3 letter, was provided to the wife's counsel the same day it was filed.

[11] On January 6, 2022, the wife's counsel appears to have re-sent the December 3, 2021 letter along with an email advising that the wife also needed a copy of the filed Child Support Order for her refinancing application. As the Child Support Order had not yet been entered, she enclosed it (again) and asked for it to be endorsed and returned.

[12] The wife's counsel provided periodic updates to both AH and MD into January and February 2022. On January 12, 2022, the wife's counsel sought confirmation that the husband would sign the necessary documents to transfer the land as they had inadvertently left out of the Consent Order a term requiring the parties to cooperate in the execution of any documents required to facilitate the transfer.

[13] MD forwarded this email to the husband. The husband advised MD that he would sign the required documents once the wife's mortgage was finalized. The husband noted he had not seen any proof of refinancing, which was required in December, and that he would not sign any extension if the wife could not come up with a mortgage and close the transaction before January 31, 2022. MD did not bring to husband's attention the contents of the December 3, 2021 letter referencing the agreement between AH and wife's counsel.

[14] Notwithstanding the December 3, 2021 letter confirming the agreement between the wife's counsel and AH to extend the December 21, 2021 refinancing deadline, MD responded to the wife's counsel on January 14, 2022 (copying AH), stating that the Consent Order required proof of refinancing on or before December 21, 2021, and that his office had not received anything. He

asked if the wife was seeking to refinance the existing mortgage or if she was obtaining a new mortgage all together.

[15] Notably, MD always copied AH on communications with wife's counsel as well on his communications with the husband.

[16] On January 21, 2022, MD followed up with counsel for the wife regarding his email of January 14, 2022 as there had been no response.

[17] On January 21, 2022, the wife's counsel replied that she missed the January 14 email from MD. She reiterated her request for confirmation that the husband would sign documents to transfer the land. She also noted that the wife was waiting for the filed Child Support Order back from the Court to support the refinancing application.

[18] On January 24, 2022, MD advised that the husband would sign the required forms, pending confirmation that the wife was obtaining a new mortgage all together. MD did not advise that the husband was insistent on the January 31, 2022 closing date provided for in the Consent Order.

[19] The Child Support Order was filed on January 27, 2022.

[20] On February 2, 2022, MD wrote to the husband that the wife's purchase of the matrimonial home, which was to close on January 31, 2022, did not proceed. Further, he confirmed that the wife failed to provide any documents regarding pre-approval of the mortgage refinancing. MD also wrote, "We will be writing to the other side to have the home listed for sale, unless you have any objections. Kindly provide me with the names of your proposed realtor." No such letter was ever sent by AH or MD to the wife's counsel.

[21] The next day, on February 3, 2022, the wife's counsel served the filed Child Support Order, confirmed that the wife was obtaining a new mortgage and that they would advise on the timeline to complete the refinancing and transfer of the matrimonial home.

[22] The husband's counsel received the transfer documents on February 15, 2022, with a deadline to close of March 15, 2022. MD forwarded these documents to the husband noting the missed deadlines with three options on how to proceed (1) sign the documents and transfer the matrimonial property; (2) list the home for sale; or (3) wait for mediation to determine disposition. The transfer documents were not returned to the wife's counsel and there were no further communications between the parties' then counsel.

[23] Shortly thereafter, the husband retained new counsel who took a few days to get up to speed on the file. Ultimately, the husband refused to sign the transfer of land. There were further communications between counsel, but the issue was not resolved.

[24] On March 9, 2022, the wife filed an urgent application to dispense with the husband's signature on the transfer of land. She argued that given the conversation between counsel on December 3, 2021, the initial timing of the deadlines, and the delay in receiving the filed Consent Order and Child Support Order, the wife had until January 11, 2022 to provide proof of refinancing and until February 22, 2022 to close. She would have met this closing deadline had the husband signed the transfer documents provided to him on February 15, 2022.

[25] The husband's evidence was that he was never consulted about or gave any instructions to his former counsel regarding an extension to any deadline in the Consent Order. He argued that the wife's position was entirely unsupported by the December 3, 2021 letter which indicated that the flexibility was needed because of the settlement agreement (and was not due to the delay in filing of the Consent Order). Further, he noted that there was no documentation to support an agreement to extend the closing deadline. Finally, he pointed to his communications with MD that was contrary to the suggestion any extension agreement existed.

[26] On March 14, 2022, the wife's application was dismissed. The chambers judge was not satisfied that there was an agreement to extend the deadlines.

[27] On May 12, 2022, a justice of this court stayed enforcement of the chambers judge's order pending appeal.

Issues on Appeal and Standard of Review

[28] The wife appeals alleging that the chambers judge erred in determining that no agreement existed between counsel regarding flexibility of the Consent Order deadlines. The wife relies on the Law Society of Alberta's Code of Professional Conduct and argues there was an obligation on the husband's former counsel to advise if there was a misunderstanding. She notes that complying with the December 21, 2021 deadline was an impossibility given that she needed the filed Consent Order and Child Support Order to support her refinancing application. She also points to correspondence as late as January 24, 2022 wherein the husband's counsel confirmed that the husband would sign the transfer documents. She acknowledges that there was nothing in writing expressly addressing an extension of the January 31, 2022 closing date itself, however, she states, that agreement was implied in the circumstances.

[29] The parties agree that these issues engage conclusions of fact or mixed fact and law and cannot be disturbed absent palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 at paras 10 and 36.

Analysis

[30] The chambers judge's reasons were brief. He stated:

I am not convinced on the evidence before me that there is an agreement extending this particular matter. Based upon the emails that I have seen, including this email seeking instructions from his client, I do not see that there has been any definitive agreement to extend. I am not satisfied of that.

[31] In giving his decision, the chambers judge was not clear in what he meant when he referred to “an agreement extending this particular matter”, and specifically, he did not address the contents of the December 3, 2021 letter. The critical portion of the December 3, 2021 letter was “...we confirm that you advised that you are amenable to treat the December 21, 2021 deadline as flexible, so long as our client is taking steps to submit her [refinancing] application.” At no time after receiving this letter did AH or MD contest that an agreement to extend the refinancing deadline was reached or that the agreement to treat the December 21 date as flexible had come to an end.

[32] The wife’s counsel kept the husband’s counsel informed of the steps being taken in regard to the wife’s refinancing application, including advising on January 6, 2022 that a filed copy of the Child Support Order was (still) required, but had yet to be entered. A filed copy of the Child Support Order was not received by the wife’s counsel until January 27, 2022, just three days after the husband confirmed, through his counsel, that he would sign transfer documents when provided. At that juncture, the wife was still taking steps to submit her application for refinancing of the family home. It would appear that she thereafter took prompt steps to submit her application for refinancing as the transfer documents were prepared and sent to opposing counsel on February 15, 2022.

[33] While there was no explicit agreement to extend the January 31, 2022 closing date set out in the Consent Order, the terms of the agreement to treat the refinancing deadline as flexible necessarily meant that the closing deadline may also have to be extended. The January 24, 2022 communication from the husband’s counsel confirming that the husband would sign “the required forms, pending confirmation your client is obtaining a new mortgage all together” contained no indication that the husband was insisting on closing by January 31, 2022. On the contrary, the representation that the husband would sign the required documents conveyed his agreement to reasonably extend the closing date just as the date for refinancing had been reasonably extended. In our view, the chambers judge committed a palpable and overriding error when he failed to address the contents of the December 3, 2021 letter which referred to an agreement to extend the December 21, 2021 deadline in the Consent Order, and subsequent communications between counsel in relation to the anticipated transfer of the matrimonial home.

[34] When viewed objectively, the January 21 and 24, 2022 communications between counsel – in light of the December 3, 2021 letter – are evidence of agreements between counsel that the December 21, 2021 financing deadline would be extended as long as the wife was taking steps to secure refinancing and that the husband would sign the necessary documents to transfer the land once the documents were received. This agreement was confirmed even after the husband’s counsel referred to the original December 21, 2021 deadline having been missed.

[35] Accordingly, the appeal is allowed.

[36] The wife shall have 90 days from the date of these reasons to complete the purchase of the matrimonial home for the amount set out in the Consent Order. The husband will have 7 days from the date of receipt of the closing documents by his counsel (if represented) or himself (if unrepresented), to sign and return the closing documents to the wife's counsel. If the wife's counsel does not receive the signed closing documents in the timeframe stipulated, the husband's consent on the transfer of land and any other documents required to facilitate transfer of the matrimonial home, including any consent required by the *Dower Act*, RSA 2000, c D-15, shall be dispensed with.

[37] Costs are awarded to the wife in accordance with Column 4 of Schedule C of the *Alberta Rules of Court*, Alta Reg, 124/2010.

Appeal heard on December 5, 2022

Memorandum filed at Calgary, Alberta
this 8th day of December, 2022

Authorized to sign for: Hughes J.A.

Ho J.A.

Authorized to sign for: Kirker J.A.

Appearances:

L.M. Handfield
for the Appellant

C.N. Malongue
for the Respondent