SUPREME COURT OF YUKON

Citation: *Jones v. Duval*, 2020 YKSC 10

Date: 20200319
S.C. No. 18-A0016
Registry: Whitehorse

BETWEEN

CATHERINE MELISSA JONES

PETITIONER

AND

ODILE JEANNE DUVAL

RESPONDENT

Before Mr. Justice Paul S. Rouleau

Appearances:

André W.L. Roothman — Counsel for the petitioner
Odile Jeanne Duval — Appearing on her own behalf

REASONS FOR JUDGMENT

A. OVERVIEW

[1] The parties co-owned a property as joint tenants. The petitioner obtained an order from this court to have that property sold and the proceeds of sale have been paid into court. The parties appeared before me by videoconference on March 4, 2020, to settle the two remaining issues in this proceeding: (1) the distribution of the proceeds of sale and (2) costs of the proceeding.

B. BACKGROUND

[2] The relevant background was set out by my colleague Campbell J. in her reasons for judgment in this matter: *Jones v. Duval*, 2018 YKSC 33. Nevertheless, I summarize the central facts briefly.

[3] The petitioner and the respondent were joint tenants of a property, which they purchased together in 2016. The property appears to have served as a residence for both parties and as a base of operations for a related corporation Alligator Lake Aurora Lodge Inc. (the "company") through which the parties operated a business. The purchase was financed in part by a jointly-contracted mortgage with the Canadian Imperial Bank of Commerce ("CIBC"). The parties also had two joint personal loans with CIBC, as well as other joint personal loans.

[4] In fall 2017, the petitioner began talking about the possibility of selling the property amid the parties' deteriorating financial situation. The respondent was opposed to selling the property. As their personal and professional relationship deteriorated, the respondent had, by March or April 2018, restricted the petitioner's access to the property. The petitioner resided elsewhere, while the respondent continued to reside at the property.

[5] On May 7, 2018, the petitioner commenced this proceeding, seeking an order pursuant to s. 34 of the *Judicature Act*, R.S.Y. 2002, c. 128, forcing the sale of the property and giving her conduct of the sale. The matter was heard by Campbell J. on July 11, 2018.

[6] The respondent did not oppose the sale at the hearing, but opposed the petitioner being granted sole conduct of the sale. She asked (1) that a neutral party be

appointed to conduct the sale, (2) that the petitioner be ordered to produce records related to the company, and (3) that an accountant be appointed to do a full accounting of the company and the parties' financial situation. She alleged that the petitioner diverted money away from the company for her own benefit.

[7] Campbell J. concluded that it was necessary and expedient to order the sale of the property and appointed Graham Lang, a third party real estate lawyer, for this purpose. Campbell J. explained that, because the parties comingled their personal finances with those of the company, and the company was not a party to the proceeding, the court was not in a position to address issues arising from the parties' interactions with the company. In any event this was simply a petition to sell the jointly-owned property and not the proper forum to settle the parties' business relationship.

[8] According to the affidavit of Mr. Lang, the respondent delayed the sale of the property by: (1) refusing the appraisal on the grounds that she was considering appealing the order and required a copy in French; (2) refusing to accept the appraisal once it had been completed; and (3) refusing access to the home during visits, cancelling showings and denying access to certain realtors. His evidence is that these disruptions at least doubled the costs of his services. In her affidavit, the respondent denies having caused delays in the sale of the property and says that they resulted from a failure of Mr. Lang to properly communicate with her.

[9] The property was eventually sold. The proceeds of sale were ordered by this court to be distributed first to outstanding property taxes and water and sewer rates, second to repay the CIBC mortgage, third to pay the real estate commission, fourth to pay Mr. Lang for his services, and finally with the balance to be paid into court. This

remaining balance held by the court is $88,166.29. It is the distribution of this amount that is at issue.

C. ISSUES

[10] The following issues were before me at the hearing:

1. Should I grant the respondent's request for an adjournment?
2. How should the remaining proceeds of sale be distributed among the parties?
3. What is the appropriate costs award?

D. ADJOURNMENT

[11] At the outset of the hearing, the respondent sought an adjournment of at least a few days. She emphasized that she had only received notice of the hearing the previous week, that she had been served with lengthy documents in English, one as recently as March 2, and that she had been unable to engage the services of a lawyer. The petitioner opposed the adjournment request, arguing that this hearing had been set since the case management order of Campbell J. dated October 30, 2019, and the respondent would therefore have been aware of this hearing since that date.

[12] I denied the respondent's request. This hearing was scheduled at a case management conference at which the respondent attended in person. Since then, the respondent had filed affidavit evidence relating to the issues before me. Both parties express a desire, in their evidence, to use the money held in court to pay off joint debts as soon as possible. These debts continue to accumulate interest and it is in neither party's financial interest to delay the payment out of court, nor to suffer the costs of an additional appearance. For these reasons, I determined that it was not in the interests of

justice to grant the adjournment, denied her request and proceeded to hear the application.

E. DISTRIBUTION OF THE PROCEEDS

[13] The central issue is how to distribute the money held in court as between the parties.

(1) Positions of the Parties

[14] The petitioner's position is that the three remaining joint personal debts owed by the parties should be paid off using the money held in court. These are referred to in the petitioner's affidavit dated March 2, 2020, as the "CIBC" loan, the "Citi Financial" loan and the "RBC" loan (referred to collectively as the "outstanding joint personal loans"). As of February 28, 2020, the petitioner's evidence is that the balances on these loans were $3,678.76, $3,586, and $5,328.33, respectively, though interest continues to accrue.

[15] The petitioner also acknowledged that as of February 2018 she had stopped making payments on the mortgage. As a result, she agreed that the respondent should be reimbursed from the moneys in court for the mortgage payments she made between February and August 2018. Those are set out in the petitioner's affidavit dated November 27, 2019.

[16] In addition, the petitioner sought to be reimbursed for a payment of $12,733.82 she made to satisfy a separate joint personal loan with CIBC.

[17] Regarding the mechanism of payment out of court, the petitioner asked the money held in court be transferred to a trust account at the firm of the petitioner's counsel, from which the required payments could be made.

[18] The respondent agreed that the three outstanding joint personal loans should be paid from the court held funds.

[19] She further agreed that she should be repaid for the mortgage payments made between February and August 2018.

[20] In addition, she submitted that there were additional debts she incurred in relation to their business that should be paid. These debts, including various credit card debts, are described in her affidavit dated January 17, 2020. She submitted further that she had made payments on these and other business-related debts which should be reimbursed out of court held funds.

[21] The respondent's initial position was to oppose the administration of the payments out of court by the firm of the petitioner's counsel. However, when assured that lawyers are bound to follow the orders of the court, and that she would receive a statement of account allowing her to verify that the money had been distributed in accordance with such order, she agreed that the distribution of funds should be administered this way.

[22] The respondent, in both her affidavit and her submissions, argues that the proceeds should be divided three ways, between the petitioner, the respondent and a third party, Yukiko Yoshida. The respondent refers to Ms. Yoshida as a shareholder, presumably of the company. The respondent sought to rely on additional documents on this issue at the hearing, but I declined to consider these documents which were not properly in evidence.

(2) Analysis

[23] The money held in court is what remains from the sale of the property the parties held as joint tenants. Joint tenants are presumed to have an equal interest in the property to which they hold title: *Swanstrom v. Wuest*, 2018 BCSC 2299, at para. 35. The starting point is therefore that these proceeds should be divided evenly as between the joint tenants and only the joint tenants.

[24] I reject the respondent's submission that the proceeds should be divided among the three shareholders of the company. Neither Ms. Yoshida, nor the company, are parties to this proceeding. As Campbell J. found in her reasons, claims related to the company are outside the scope of this proceeding, which relates only to the sale of land which was owned by the parties as joint tenants: *Jones*, at para. 2.

[25] However, an equal distribution of these funds may result in unjust enrichment of one joint tenant at the expense of another who has incurred greater cost in improving, maintaining or preserving the value of the property. Unjust enrichment is made out where either party can establish an enrichment or benefit to the other party, their corresponding deprivation, and the absence of a juristic reason: *Kerr v. Baranow*, 2011 SCC 10, at para. 32. Where such unjust enrichment would result from an equal division of the proceeds due to the parties' uneven contributions to its value, the presumption of equal division can be rebutted, and the unjust enrichment should be accounted for in distributing the value of the property: *Lindquist v. Waring*, 2007 BCSC 205, at para. 60.

(a) The Mortgage Payments

[26] The parties agree that the respondent is entitled to payment out of court for a number of mortgage payments she alone made between February and August 2018. I agree also.

[27] Unless these payments are accounted for, the petitioner will be unjustly enriched with respect to the respondent. The amount remaining in court is higher than it otherwise would have been because these payments were made. If this balance was split evenly, the petitioner would be enriched in an amount that corresponds to the petitioner's deprivation. The respondent continued to make mortgage payments, despite the petitioner having stopped paying her share. Unjust enrichment is therefore made out. A payment equal to the total of the payments made, $13,106.66, is to be paid out of the proceeds of the property held in court to the respondent before distribution of the balance.

(b) The Petitioner's Payment of a Joint Personal Loan

[28] The petitioner submits that she should be reimbursed for a payment she made to pay off a joint personal loan with the respondent. I decline to account for this in the distribution of the proceeds.

[29] This proceeding relates only to the sale and distribution of the proceeds of the property. In this context, the role of the Court is not to do complete justice as between the parties in respect of various claims they may have against each other that do not relate to the property. In order to displace the presumption that the parties have an equal interest in and have made equal contributions to a property and are therefore entitled to the equal distribution of the sum held in court, a party must satisfy the Court

that a distribution that fails to take into account a payment will result in a party being unjustly enriched by that distribution.

[30] There is no evidence before me proving that the payment made by the petitioner constituted contribution towards the acquisition, maintenance or improvement of the property. When pressed on this issue, counsel for the petitioner essentially agreed that there was nothing in the record from which I could conclude that this joint personal loan was somehow related to the value of the property or the value of either party's interest in the property.

[31] Accordingly, it is not appropriate to address this claim in the context of the distribution of the proceeds of sale and I decline to do so.

(c) The Respondent's Personal Debts

[32] The same analysis applies in respect of the debts incurred by the respondent. There is no connection on this record showing that these debts were incurred to preserve or improve the value of the property. As such, any claim the respondent has against the petitioner regarding these debts cannot alter the parties' relative entitlements to the proceeds held in court. When pressed on this issue, the respondent essentially agreed that she cannot establish a connection between these debts and the property.

[33] Further, even if a portion of the amounts claimed constituted an unequal contribution toward the maintenance of the property, suggesting that the petitioner would be unjustly enriched by an equal distribution, there is authority that where the joint tenant in occupation claims accounting for upkeep and repairs, they should generally submit to an allowance for having had the exclusive use and occupation of the

property: *Mastron v. Cotton*, [1926] 1 D.L.R. 767 (Ont. C.A.), at p. 769. Campbell J. found that the respondent had excluded the petitioner from the property. Therefore, even if maintenance expenses going to the value of the property had been established for her period of sole occupation, the respondent would likely need to account for occupation rent.

[34] Accordingly, it would not be equitable to address this claim in the context of distributing the proceeds and I decline to do so.

(d) The Payment of the Outstanding Joint Personal Loans

[35] The parties both ask this Court to order that the money held in court be applied to the three outstanding joint personal loans. Given their consent, that these are joint debts and that the parties hold an equal interest in the remainder of the proceeds, excluding the $13,106.66 that is to be paid to the respondent alone, it is equitable in the circumstances to order these payments.

(e) Conclusion

[36] For the reasons above, I would order the remaining proceeds in court be paid to Roothman & Company in trust to be distributed as follows:

- payment to the respondent in the amount of $13,106.66;
- then, in satisfaction of the outstanding joint personal loans totalling $12,593.09 plus the interest that will have accrued since February 28, 2020; and
- finally, the remainder to be divided equally between the petitioner and the respondent.

F. COSTS

[37] The final issue in this proceeding is the appropriate costs award. For the following reasons, I would award party and party costs to the petitioner.

(1) Positions of the Parties

[38] The petitioner seeks special costs. She argues that the conduct of the respondent has been “reprehensible” for a number of reasons. First, she says that the respondent opposed the conduct of the sale by the petitioner, which led to additional costs of engaging Mr. Lang. Second, the petitioner says that the respondent was uncooperative in the sale of the property by Mr. Lang. Third, the petitioner says that the respondent has failed to provide an accounting for rental income received from having tenants at the property while insisting on financial contributions for the upkeep of the property. Fourth, the petitioner points to the respondent’s continued insistence that the debts of the company must be paid from the proceeds of sale, despite Campbell J.’s holding that the financial affairs of the company were outside the scope of this proceeding. Fifth, the petitioner points to unproven allegations of fraud in the respondent’s affidavit. Finally, the petitioner points to correspondence between her counsel and the respondent in which the respondent refused to consent to a payment out of court to satisfy one of the outstanding joint personal loans.

[39] The respondent is opposed to paying costs, and in particular special costs. She disputes that her attitude should have any bearing on what is essentially a financial matter. She says that it was the petitioner’s choice to go to court. She maintains that she did not exhibit inappropriate behaviour in court and said that the delay in the proceedings resulted from a lack of communication, exacerbated by linguistic and

cultural differences. Finally, she emphasized that she lacked the financial resources to pay a costs award even on a party and party scale.

(2) Analysis

[40] I decline to award the petitioner special costs.

[41] Special costs are the exception to the general rule that costs are to be assessed on a party and party basis: *Rules of Court*, YOIC 2009/65, Rule 60(1). Special costs are awarded only in cases were a party has acted in a reprehensible, scandalous or outrageous manner: *Golden Ventures Limited Partnership v. Ross Mining Limited and Norman Ross*, 2012 YKSC 18, at para. 6. They are to be awarded sparingly: *Simon v. Poirier*, 2019 YKSC 56, at para. 73.

[42] I do not consider the respondent's conduct in this litigation rose to the level of being "reprehensible". First, it was certainly not reprehensible for the respondent to seek the appointment of a third party to conduct the sale of this property. This was a reasonable position to take given the apparently difficult relationship between the parties, and the position was successful before this court.

[43] The other points raised by the petitioner show that in some instances the respondent was less than cooperative. The evidence of Mr. Lang also shows that her continued presence at the property made its sale more difficult. She appears to have refused some reasonable requests from the petitioner's lawyer. Further, her continued focus on matters which were not properly before this Court, such as the company's finances and unproven allegations of fraud, was inappropriate.

[44] On the other hand, the respondent has made appropriate concessions before this Court regarding both the need to sell the land and the appropriate distribution of the

proceeds of sale. While the fact that she was self-represented in these proceedings does not relieve her of her responsibility as a litigant, I take this into account in deciding whether her conduct is deserving of an increased costs award: *Trenholm v. Jaszczyszak*, 2016 ONSC 2226, at para. 19. It is clear that the respondent's limited understanding of the nature of the proceedings contributed, at least in part, to some of the behaviour of which the petitioner complains.

[45] On balance, and in light of the exceptional nature of special costs awards, I do not find that the conduct of the respondent rises to the level of reprehensible conduct warranting an award of special costs, and I decline to make such an award.

[46] The general rule is that costs follow the event: Rule 60(9). I see no basis here to depart from the general rule. In particular, I note that financial hardship of a litigant is generally insufficient on its own to justify departing from the general rule: *Latkin v. Vancouver (City)*, 2014 BCSC 484, at para. 26. Given the substance of this proceeding was the sale of land by the court sought by the petitioner, which was successful, I would award her costs on a party and party basis.

G. CONCLUSION

[47] The proceeds of sale held in court are to be distributed as outlined in these reasons. The petitioner is entitled to her costs on a party and party basis.

____

ROULEAU J.