

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Holmes v. Matkovich*,
2007 YKSC 05

Date: 20070112
S.C. No. 06-D3856
Registry: Whitehorse

Between:

KATHLEEN HELEN HOLMES

Petitioner

And

VERNON CYRIL MATKOVICH

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Debbie P. Hoffman
Glenda A. Murrin

Counsel for the petitioner
Counsel for the respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] On January 8, 2007, Ms. Holmes applied for an order that Mr. Matkovich's Answer and Counter-Petition be struck and this matter proceed to trial on January 29, 2007 on an uncontested basis. I ordered, among other things, that Mr. Matkovich's pleadings be struck and that the trial proceed on an uncontested basis. Mr. Matkovich has been ably represented throughout this proceeding but his counsel has always made it abundantly clear that she is not trial counsel. No trial counsel has ever appeared.

BACKGROUND

[2] Ms. Holmes and Mr. Matkovich have lived together since 1985. They married on January 11, 2000 in Whitehorse and separated in December, 2005. They have one child who is 15 years old.

[3] The family home is a hay farm on the Indian River south of Dawson City. Mr. Matkovich has resided there while he works for Klondike Star Mineral Corporation, a mining company in the Dawson area. He also rents heavy equipment through a numbered company, 19651 Yukon Inc., with a partner who operates the equipment owned by Mr. Matkovich.

[4] Many of the documents necessary for the trial of this matter were in the possession of Mr. Matkovich at the family home.

[5] Counsel for Ms. Holmes proceeded in a collaborative manner by letter to Mr. Matkovich dated January 24, 2006 requesting that no later than February 27, 2006, he produce his financial information and to specifically include the following:

- (a) His last five years' Income Tax Returns;
- (b) His last five years' Notices of Assessment from Revenue Canada;
- (c) Financial statements for 19651 Yukon Ltd. as well as all other business statements and records pertaining to his business endeavours;
- (d) A list of all equipment and tools that are currently at the farm, including registration for each piece of equipment;
- (e) Any and all information pertaining to the assets that are held either solely in his name, or by him and Ms. Matkovich jointly.

- [6] Mr. Matkovich retained Ms. Murrin and Ms. Holmes' lawyer sent her a copy of the January 24, 2006 letter and made some additional requests for financial information in a letter dated March 10, 2006. Ms. Murrin is corporate counsel for Mr. Matkovich.
- [7] In the meantime, Ms. Holmes became concerned about Mr. Matkovich disposing of assets like his gun collection. Counsel also began to attempt to resolve matters amicably with respect to the sale of a 2004 Dodge truck. However, before an agreement was reached, Mr. Matkovich advised through his lawyer that the truck had been sold to a third party.
- [8] On July 11, 2006, counsel for Ms. Holmes advised Mr. Matkovich's counsel that Ms. Holmes wished to return to the family home and have the use of the truck. Mr. Matkovich had parked a piece of heavy equipment in the driveway preventing Ms. Holmes' access to the family home. Counsel for Ms. Holmes advised that if agreement could not be reached, she would apply to court for a restraining order preventing disposal of assets, exclusive possession of the family home and use of the 2004 Dodge truck.
- [9] Counsel for Mr. Matkovich made a counter proposal and Ms. Holmes applied to Court on July 18, 2006. Mr. Matkovich's counsel appeared at the hearing without having filed any evidence on behalf of Mr. Matkovich. I ordered the following on an interim interim basis to allow Mr. Matkovich to file evidence:
- (a) That Mr. Matkovich was prohibited from disposing of or encumbering assets;

- (b) That Mr. Matkovich remove the equipment from the driveway and provide access to the family home;
- (c) That the 2004 Dodge truck be sold for \$29,500 and the proceeds be placed in Mr. Matkovich's lawyer's trust account pending agreement between the parties or further order;
- (d) That Mr. Matkovich file his Financial Statement setting out his personal, family and corporate assets and debts, and deliver a copy to Ms. Holmes' lawyer by August 3, 2006.

[10] The next step in this proceeding was a pre-trial conference on October 5, 2006. Mr. Matkovich was represented by the same counsel. Mr. Matkovich had not complied with the July 18, 2006 order to file a Financial Statement. I ordered that Mr. Matkovich file his Financial Statement by October 20, 2006. I also set the matter down for a hearing on January 29 to February 2, 2007.

[11] On October 20, 2006, Mr. Matkovich filed a Financial Statement which was incomplete. It is the only affidavit that Mr. Matkovich has filed during the three chambers hearings in this matter. It did not disclose the information on 19651 Yukon Inc., his placer claims, his personal recreation equipment or his gun and ivory collections. Counsel for Ms. Holmes sent another letter dated October 25, 2006 requesting further information and his List of Documents to be produced by October 23, 2006.

[12] Counsel for Ms. Holmes requested the information and documents verbally on November 3, 2006.

[13] Counsel for Ms. Holmes filed an application to be heard on December 13, 2006 asking, among other things, to have Mr. Matkovich's Answer and Counter-Petition struck and an order for special costs. Mr. Matkovich did not respond by affidavit to the application. The application included a specific list of documents to be produced relating to 19651 Yukon Inc. and his employment and work with Klondike Star Mineral Corporation.

[14] On December 13, 2006, I made the following order:

1. The Respondent shall do the following by no later than Friday January 5, 2007 at 4:00 p.m.:
 - (a) Pay all of the legal fees and disbursements of the Petitioner for all matters since the preparation of the application that was heard on July 18, 2006 to and including the date of today's hearing;
 - (b) File a complete Financial Statement as required in the July 18, 2006 Order including but not limited to full disclosure of the revenue, assets and activities of 19651 Yukon Inc., the placer claims owned directly or indirectly by the Respondent and any verbal or written agreements with Klondike Star Mining Corporation and the value of such arrangements;
 - (c) Provide his List of Documents and the documents themselves to the Petitioner's counsel;
2. If the Respondent fails to comply with the orders set out above he may be found in contempt of court and have his pleadings (comprised of his Answer and Counter Petition), struck and the trial proceed as though no Appearance has been filed under Rules 2 and 56 of the *Rules of Court*, and such application for contempt and for the Respondent's pleadings to be struck shall be heard on January 8, 2007 at 10:00 am.

[15] I wanted to be very specific for Mr. Matkovich about the consequences of a failure to comply with the December 13, 2006 order.

- [16] Mr. Matkovich responded by filing a List of Documents consisting of 63 documents on January 5, 2007. He also filed an unsworn Amended Financial Statement appended to an affidavit of his counsel on January 5, 2007.
- [17] At the time of hearing this matter on January 8, 2007 at 10:00 am, Mr. Matkovich had not paid the special costs of Ms. Holmes in the approximate amount of \$14,353.
- [18] His Amended Financial Statement was unsworn as Mr. Matkovich is apparently in Brazil. The income stated in the Amended Financial Statement remains the same as in his previous Financial Statement, despite his own documentation confirming dividend income from 19651 Yukon Inc. in the amount of \$40,000. He has still refused to list his placer claims and their value in his Statement. He has not disclosed his arrangement with his partner in 19651 Yukon Inc. He has not included a value of his ivory and gun collections, nor a debt owed to his sister. He has estimated the value of his stocks and bonds at \$3,000.00 without explanation.
- [19] His List of Documents filed January 5, 2007 is the only production he has made since the first letter demand in January 2006. It provides tax returns for 2002 to 2004 but only a draft return for 2005 without any T4 information. He has supplied no banking information for himself or 19651 Yukon Inc. He has not listed his placer claims. He has not produced the purchase documentation for the family home.
- [20] The corporate documents he has listed for 19651 Yukon Inc. come from BDO Dunwoody who provides "the information on a draft basis" because of a lack of

supporting information, such as all banking information and information on income. The company has not reported any federal income tax despite operating since 2001.

ANALYSIS

[21] The effect of non-compliance with the *Rules of Court* and court orders is set out in Rule 2 as follows:

- (2) Subject to subrules (3) and (4), where there has been a failure to comply with these rules, the court may:
 - (a) set aside a proceeding, either wholly or in part,
 - (b) set aside any step taken in the proceeding, or a document or order made in the proceeding,
 - (c) allow an amendment to be made under Rule 24,
 - (d) dismiss the proceeding or strike out the statement of defence and grant judgment, or
 - (e) make any other order it thinks just.

...

- (5) Where a person, contrary to these rules and without lawful excuse,

...

- (c) refuses or neglects to produce or permit to be inspected any document or other property,
- (d) refuses or neglects to answer interrogatories or to make discovery of documents, or

...

then

- (g) where the person is the defendant, respondent or a third party, or a present officer of a

corporate defendant, respondent or third party, or a partner in or manager of a partnership defendant, respondent or third party, the court may order the proceeding to continue as if no appearance had been entered or no defence had been filed.

- (6) Where a person, without lawful excuse, refuses or neglects to comply with a direction of the court, the court may make an order under subrule (5)(f) or (g).

[22] The issue of contempt of court which I raised in my order of December 13, 2006 is set out in Rule 56(4):

A person who is guilty of an act or omission described in Rule 2(5) . . . in addition to being subject to any consequences prescribed by those rules, is guilty of contempt of court and subject to the court's power to punish contempt of court.

[23] The remedy of striking out a pleading is reserved for the most serious cases. As stated by Southin J., in *Homer Estate v. Eurocopter S.A.*, 2003 BCCA 229, at paragraph 4, Rule 2 permits the court to strike out a pleading but it is reserved for "the most egregious of cases because it deprives the litigants of a trial on the evidence." In that case, the remedy was not applied despite the fact that the defendants had not met the requirements of the rules of discovery "with that precision and sense of duty that one expects of a litigant."

[24] In *Eisele v. B.A. Blacktop Ltd.*, 2004 BCSC 521, at paragraph 15, Cole J., relying on *Ultra Fuels Ltd. v. Kern*, [1992] B.C.J. No. 1697 C.A., decided that the onus is on the defendant to establish lawful excuse and explain the reason for its non-compliance. In that case, he concluded that although there was non-compliance, the defendants attempted to make full disclosure. In paragraph 20, he stated:

“If it was not for the fact that the defendants have attempted to make full disclosure, I would have no difficulty dismissing this action. However, because of what I perceive to be a misunderstanding of counsel's duty, I find that it would be extremely unfair to visit counsel's error of judgment on his client. I agree with our Court of Appeal in *Hauwelling v. Dowak Industries Ltd.*, [1980] B.C.J. No. 1276 (C.A.) where the Court states at [paragraph] 10:

To invoke rule 2 subrule (5) and to give effect to such an application, in my view, should only be done as a last resort. The effect of it is to deny the defendant the right to proceed to trial and that is a step that should only be taken where, as the rule sets forth, it is clear that the defendant has refused or neglected to comply with the rules without lawful excuse.”

[25] The remedy of striking out a pleading is a discretionary one to be applied only in the most serious cases.

[26] I have concluded that Mr. Matkovich has no lawful excuse for failure to comply with the orders of this Court on July 18, 2006, October 5, 2006 and December 13, 2006.

[27] However, it can be argued that he has now at least partially complied with the order of December 13, 2006 and his failure is not one of disregarding a court order but a failure to furnish full disclosure.

[28] While this argument has superficial merit, I am of the view that Mr. Matkovich has not failed to comply because of any misunderstanding of the law or the court orders. Rather, he has ignored the orders of this Court for a period of five months, in effect depriving Ms. Holmes of her right to a fair trial to establish the value of Mr. Matkovich's assets. It would be unfair to allow Mr. Matkovich to appear at trial to justify his failure to disclose and advance arguments at trial to undermine Ms. Holmes' evidence based upon the inadequate disclosure he has made.

[29] I consider that the conduct of Mr. Matkovich strikes at the heart of the civil justice system. He has repeatedly ignored Court orders and now, at the last minute, provides partial disclosure. While the partial disclosure may render a contempt order somewhat harsh, it is appropriate to consider the remedy of striking his pleadings.

[30] There is no evidence to indicate Mr. Matkovich will provide full disclosure at any time in the future, nor is there any evidence that he has retained counsel for trial or that he will return from Brazil for the trial. I should also indicate that in this jurisdiction, it is the rule rather than the exception that divorce cases go to trial within one year from retaining counsel.

CONCLUSION

[31] I have concluded that despite the attempts by counsel for Ms. Holmes and the three orders of this Court, Mr. Matkovich has not complied with the disclosure order. The result is that Ms. Holmes wishes to proceed to trial on January 29, 2007 but Mr. Matkovich has failed to produce the necessary documentation to permit Ms. Holmes to fairly assess the corporate and personal assets of Mr. Matkovich. In effect, he has deprived her of a fair trial by his non-disclosure and he has disregarded the orders of this Court to make a full and complete disclosure of his assets. I have concluded that further orders for disclosure will be fruitless. For these reasons, I find it appropriate to strike Mr. Matkovich's Answer and Counter-Petition and order that the trial proceed on an uncontested basis.

[32] I have also ordered that the special costs of Ms. Holmes for this and the previous applications be paid from the \$29,500 in Ms. Murrin's trust account, and I order

that Ms. Murrin transfer the entire \$29,500 to counsel for Ms. Holmes. The balance shall remain in trust pending further court order.

[33] The application for contempt of court is adjourned generally. I also ordered that child support in the amount of \$1,164.00 be paid by Mr. Matkovich to Ms. Holmes commencing December 1, 2006.

Veale J.