

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *McLeod v. Moritz*, 2007 YKSC 56

Date: 20070827
Docket: S.C. No. 05-B0102
Registry: Whitehorse

BETWEEN:

HEATHER D. MCLEOD

Plaintiff

AND:

KURT S. MORITZ

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
Kathy Kinchen
Kurt Moritz

Counsel for the Plaintiff
Appearing on his own behalf

**REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH**

[1] GOWER J. (Oral): This is an application by the plaintiff, Ms. McLeod, for an order that property legally described as Lot 70, Porter Creek, Whitehorse, Yukon, Plan 25142, and municipally located at 1207 Centennial Street, which I will refer to as 1207, now standing in the names of the parties as joint tenants, is held by them in trust for the plaintiff absolutely.

[2] In the alternative, as I take it, that an alternative remedy is sought, that the defendant's interest in 1207 be transferred and conveyed to the plaintiff for her own use

absolutely. The plaintiff also sought an order that she holds an interest in the defendant's business, known as Mister K's Plumbing and Building Repairs, or, in the alternative, that she be paid for her direct and indirect contributions to the business. She also seeks costs.

[3] In her submissions this morning, Ms. Kinchen, on behalf of Ms. McLeod, indicated that she is primarily seeking the alternative relief regarding the business, and that is, to be repaid for her direct and indirect contributions, and not to seek an order that Ms. McLeod holds an interest in the business.

[4] The evidence on this application is in the form of an affidavit from Ms. McLeod, sworn August 12th and filed August 14, 2007, and in an affidavit from Mr. Moritz, sworn and filed on August 24, 2007. The notice of motion and affidavit were served on Mr. Moritz on August 14, 2007. He appears today representing himself.

[5] This is an application by way of a summary trial under Rule 18A of the *Rules of Court*. In the annotations to Rule 18A, there are a couple of cases referred to that I would just like to cite, as they pertain to and guide my thinking on this application.

[6] The first is *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988), 27 B.C.L.R. (2d) 378. The annotation says:

"... if adequate notice is given to an opposing party that a summary trial application is going to be brought on, there then falls on that party an obligation to take every reasonable step to complete as many of the pre-trial procedures as are necessary to put him into the best mastery of the facts that is reasonably possible before the summary trial proceedings are heard. He cannot, by failing to take those pre-trial procedures, frustrate the benefits of the summary trial."

[7] The next case I would refer to there is *Strathloch Holdings Ltd. v. Christensen Bros. Foods Ltd.* (1997), 29 B.C.L.R. (3d) 341, and the annotation there says:

"... in the course of a summary trial, disputed facts cannot be established by statements of counsel."

Of course, that would also apply to statements made by any self-represented litigants.

[8] The third case that I would refer to is *Tunner v. Novak* (1993), 76 B.C.L.R. (2d) 255. The annotation there reads:

"An admission or provisional acceptance of a fact by counsel --

[or, I would say, by a self-represented litigant]

-- on a Rule 18A application is equivalent to proof of those facts for the purpose of the summary trial."

[9] Now, this is a situation involving a common-law relationship which began about July 2003, and ended when the parties separated in September 2005. At the time the relationship began, each party was residing in their own separate home. They decided to sell their respective homes and purchase a third property, which they would then use as a combination of a rental or income property, and also for their new communal home. That property is a duplex located at 1207 Centennial Street, Whitehorse.

[10] There was a good deal of evidence about the financial arrangements between the parties while they were in the process of selling their respective homes and prior to acquiring and moving into 1207. I do not find that that evidence is particularly helpful or relevant as it does not specifically pertain to the direct and indirect contributions that were made by the two parties to 1207.

[11] According to Ms. McLeod, she made a number of contributions towards 1207, the first being an initial down payment and payment of legal fees in the amount of \$6,482.78; also renovations to 1207 in the amount of \$13,424.53; various utility payments made with respect to 1207 in the amount of \$6,228.03, and also the cost of moving from their home on Loganberry Lane, which they lived in for a period of time together before moving into 1207, in the amount of \$1,211.24. The total of those amounts is \$27,346.58.

[12] Ms. McLeod acknowledges that some renovation and repair work was done by Mr. Moritz and/or his company on 1207. On or about September 17, 2004, she received an invoice numbered 00828 for \$3,204.07 from Mr. Moritz, which specified charges of \$1,725 for labour and \$1,269.42 for materials, and that is set out as Exhibit M of her affidavit. Attached to that invoice were two further pages: One was a material list, totalling the materials purchased, for \$1,269.42, and a second list respecting the labour of Mr. Moritz's employees, identified as Morgan and Brian. A number of dates are set out there, and in each case the labour charge was at the rate of \$15 per hour.

[13] Subsequent to that invoice being presented, Mr. Moritz sent a letter to Ms. McLeod, dated July 19, 2007. That letter encloses and refers to the original invoice which I just mentioned, dated September 17, 2004 and numbered 00828, in the amount of \$3,204.03. It also refers to an invoice dated April 26, 2005, for \$2,654.39. That invoice is attached, and refers to work done by an electrical sub-contractor in that amount. With interest, the total claimed as due by Mr. Moritz from Ms. McLeod, as of the date of that letter, was \$7,344.36.

[14] I mention the electrical sub-contractor's invoice because in Ms. McLeod's affidavit, she acknowledges at paragraph 21, that Mr. Moritz did some work on 1207B, including arranging for some electrical work to be done. It appears, from what I can infer, that the electrical sub-contractor's invoice was not submitted at the time, but was later submitted, and it appears on its face to be a valid invoice.

[15] So the total contributions, then, according to Ms. McLeod's evidence, made by Mr. Moritz respecting 1207, would be \$5,858.42 (\$3,204.03 + \$2,654.39). If you subtract that from the total contributed by Ms. McLeod (\$27,346.58), you end up with a number of \$21,488.16. If you divide that by two to indicate what Mr. Moritz's responsibility would be for those contributions, you end up with a number of \$10,744.08, that is, assuming Mr. Moritz has a half interest in the property.

[16] Now in addition, Ms. McLeod made a number of payments and loans to Mr. Moritz respecting his business, over a period of time. Those totalled, including some payments made with respect to a MasterCard that was taken out for his benefit exclusively, although in Ms. McLeod's name, \$10,669.82. If you add that number to the former number of \$10,744.08, you end up with a total of \$21,413.90, which would be owing from Mr. Moritz to Ms. McLeod.

[17] I now have to look at what the value of the property would probably have been as of the date of separation in September 2005. The evidence on that point is at paragraph 38 of Ms. McLeod's affidavit, where she has attached a letter from Nancy McIntyre, a realtor with Coldwell Banker, as of August 26, 2005, suggesting that the

value of the property at that time would have been around \$158,000 to \$168,000, and that was just prior to the date of separation.

[18] So taking the mid-point of those values, I am looking at a probable value of around \$163,000, as of the date of separation. The balance owing on the mortgage would have been around \$121,000 as of September 2005. Therefore the total equity in the property as of the date of separation in September 2005, at most, and I emphasize at most, because that does not include deduction of real estate commissions and legal fees, would have been about \$42,000.

[19] Assuming for the moment that Mr. Moritz had a half interest in the property at that time, then his share of the equity would have been about \$21,000. It can quickly be seen that the amount owed by Mr. Moritz to Ms. McLeod already exceeds any amount of equity that he would have had in the property at that time, and that is taking Mr. Moritz's case at its best, by assuming that he has a half interest in the property by virtue of his direct and indirect contributions, and using the numbers provided by Ms. McLeod.

[20] Now in response, Mr. Moritz made submissions to me about the extent of his contributions towards 1207. He initially mentioned a cheque that was something less than \$500, apparently signed over to Ms. McLeod, a cheque issued from Robert Pitzel's law office, I assume. That was the balance, I think, of equity from the sale of his home on Takhini Road in Riverdale. However, that is denied by Ms. McLeod. She maintains that Mr. Moritz made no contribution whatsoever at the time of the purchase of 1207. I asked Mr. Moritz to provide me with some verification of the cheque, and he has been

unable to do so. There were no exhibits whatsoever attached to his affidavit, nor was he able to point to the cheque in Ms. McLeod's materials.

[21] Secondly, Mr. Moritz claims that he made a number of direct contributions by way of labour and materials through his company, both by cleaning up Ms. McLeod's former home on Loganberry Lane and helping with the move, as well as doing electrical work and various renovations to 1207.

[22] This is where the evidence gets a little murky. I have already indicated that at the time this work was done, Mr. Moritz presented Ms. McLeod directly with an invoice that was dated September 17, 2004, numbered 00828, for the total amount of \$3,204.03. Subsequently, that invoice was presented again to Ms. McLeod, under the covering letter of July 19, 2007. At that time it had similar additional sheets attached to it for labour, identifying the employees Morgan and Brian, however they are now charging out at \$45 an hour and \$35 an hour, respectively, for total labour of \$4,305. Yet, the same date (September 17, 2004) and invoice number (00828) are referenced on the time sheet. There is no explanation in the evidence for why that change was made.

[23] In addition, through the discovery process, Ms. McLeod obtained a further copy of invoice number 00828, dated September 17, 2004, from Mr. Moritz's list of documents (Exhibit N of Ms. McLeod's affidavit). That invoice, although it has the same date and number, shows labour as \$9,335, for a total of \$11,346.73, again, attaching time sheets for Morgan, charging out at \$45 an hour, and Brian, at \$35 an hour.

[24] In the course of his submissions to me, Mr. Moritz asked me to use the totals which are attached to the invoice I have just been describing (Exhibit N of Ms. McLeod's affidavit). What we did in court was go through and add the first time sheet totalling \$5,030, to the second time sheet totalling \$4,305, to the material list totalling \$1,281.16, to the electrical contractor's invoice (which is not part of that document, but which is part of the later document, given to Ms. McLeod under the letter of July 19, 2007) in the amount of \$2,654.39. The total of those numbers is \$13,270.55, which Mr. Moritz says is the amount that he is justly due, or to be credited for, as his contribution to 1207.

[25] However, remarkably, Mr. Moritz, in his affidavit at paragraph 13, and this is after having received and reviewed Ms. McLeod's affidavit for a number of days, deposed:

"The total outstanding invoices to this date are in the amount of \$16,474.58. Since this is money my company is owed, I will insist on collecting it, either through a judgment of the Court or at a later time through small claims court."

I say it is remarkable because Mr. Moritz was simply unable to explain the difference. He said he is "not much of a numbers guy" and that explanation simply does not help me in making a determination of the exact amount of his contributions. What it does do is undermine his credibility and shows that he was careless in swearing his oath at the time that the affidavit was sworn. It leaves me with no alternative but to rely on Ms. McLeod's numbers, while giving him credit for the additional electrical work, which was subsequently invoiced much later in July 2007.

[26] Mr. Moritz also suggested that his secretary made a mistake, and that she missed \$5,030 at some point in the invoicing process. Mr. Moritz said that he did not

realize that that mistake was made until just now, which I take to mean just prior or immediately prior to the hearing of this application. He also says that the letter of July 19, 2007, which was signed by him, was incorrect. Again, that just contributes to my inability to accept Mr. Moritz's submissions as to his contributions to 1207.

[27] In all the circumstances, I am persuaded by the submissions of Ms. Kinchen before me on this application, subject to the one change regarding the electrical work.

[28] I order that the defendant's interest in 1207 be transferred and conveyed to the plaintiff for her own use absolutely.

[29] I declare that the plaintiff does not owe the defendant or his company any further sum for any contribution that he made by way of renovations to 1207. I understand, based on the submissions made to me today, that, as a result of my order, the plaintiff will remove Mr. Moritz from the mortgage on 1207, so he will have no further liability with respect to that property, and she will waive, as I indicated at the outset, any claim for an interest in Mr. Moritz's business.

[30] In the circumstances, I am authorized by the *Rules of Court* to award lump sum costs. I do so in the amount of \$1,500, payable within 90 days from today's date. I will set a specific deadline. So that would be by November 27, 2007 at 5:00 p.m.

[31] Now have I omitted anything or do either of you have any questions?

[32] MS. KINCHEN: Two things. Is Mr. Moritz's signature going to be required on the mortgage?

[33] THE COURT: No.

[34] MS. KINCHEN: And the second thing is, in terms of signing off on the transfer documents, I wonder if you could give some direction? We will prepare the transfer documents and if you could give some direction, that Mr. Moritz attend at my office some time on Wednesday to sign them?

[35] THE COURT: Is that convenient for you, sir? On Wednesday?

[36] THE DEFENDANT: Whatever.

[37] THE COURT: You are shaking your head.

[38] THE DEFENDANT: In disbelief.

[39] THE COURT: Shrugging your shoulders, rather. All right. So I am going to direct, Mr. Moritz, that you attend at Ms. Kinchen's office. You mean a week from Wednesday?

[40] MS. KINCHEN: No, this Wednesday.

[41] THE COURT: Tomorrow? Or, sorry, this coming Wednesday, the 29th.

[42] MS. KINCHEN: Yes

[43] THE COURT: I am going to direct that you attend, before the close of business, Ms. Kinchen's office, that's Whittle and Company, I think you know where it

is, on this Wednesday, August 29th, to sign any necessary documents to make the transfer complete. Anything more?

[44] MS. KINCHEN: No, My Lord.

[45] THE COURT: Any questions from you, sir?

[46] THE DEFENDANT: Oh, no, I've had enough.

[47] THE COURT: Okay. Thank you.

GOWER J.