COURT OF APPEAL FOR YUKON TERRITORY

Citation: *MacNeil v. Hedmann*,
2011 YKCA 6

Date: 20110907
Docket: YU0683

Between:

Cynthia Lynn MacNeil

Respondent
(Plaintiff)

And

David George Clinton Hedmann

Appellant
(Defendant)

Before: The Honourable Madam Justice Rowles
(In Chambers)

On appeal from: Supreme Court of Yukon Territory, August 3, 2011
(*MacNeil v. Hedmann*, 2011 YKSC 45, Whitehorse Docket 09-D4165)

The Appellant appeared in person via teleconference

The Respondent appeared in person via teleconference

Place and Date of Hearing: Vancouver, British Columbia
August 18, 2011

Place and Date of Judgment: Vancouver, British Columbia
September 7, 2011

Reasons for Judgment of the Honourable Madam Justice Rowles:

[1] The defendant in matrimonial proceedings, David Hedmann, has filed a notice of motion asking for the following relief: "...the order of Judge Groves made in hearing on Wednesday, August 3, 2011 in the Yukon Supreme Court be either set aside in its entirety or set aside until such time as the Appellant's appeal in this matter is ruled on by the Court of Appeal".

[2] For the reasons which follow, I would dismiss the motion.

History of the Proceedings

[3] In reasons for judgment issued on May 27, 2011, Justice Groves granted a divorce and made various orders with respect to the parties' property and debts. His reasons are indexed at 2011 YKSC 45.

[4] In the five-day trial before Justice Groves, the division of property, including two residential properties in Whitehorse, one at 91 Wilson Drive and the other at 88 Wilson Drive, was contentious. The judge concluded, in para. 44, that the parties' prenuptial agreement dated July 7, 2006, governed ownership of their property and ordered the plaintiff have sole ownership of both the Wilson Drive properties.

[5] Justice Groves also concluded that under the agreement, each party was to be solely responsible for any debts in that party's name. As to the debts in the plaintiff's name, the judge said, in paras. 45-46:

> 45. Additionally, each party is responsible solely for the debts in their own name. It does not appear that there are any joint debts.
>
> 46. Based on this conclusion, I would not entertain any claim by MacNeil for bills, debts, or payments she has made post-separation that she believes, fairly, to be the responsibility of Hedmann. These are also governed by the Agreement. They are debts in her own name and as such her responsibility.

[6] The part of the formal order, with respect to the division of property and responsibility for payment of debts, reads as follows:

> THIS COURT ORDERS THAT:
>
> ...
>
> 2. The prenuptial agreement signed by the parties and dated July 7, 2006 governs the division of property and assets acquired by the parties during their relationship and marriage such that:
>
> a. the Plaintiff shall have full and sole ownership of 91 Wilson Drive, Whitehorse, Yukon, having a legal description of Lot #242, Plan #54813;
>
> b. the Plaintiff shall have full and sole ownership of 88 Wilson Drive;
>
> c. the Plaintiff shall have full and sole ownership of her vehicle which is described as a 2006 Honda CRV;
>
> d. the Plaintiff shall have full and sole ownership of her company CMAC Care;
>
> e. the Defendant shall have full and sole ownership of his vehicles which are described as a 2008 Subaru Tribeca B9 SUV and 2000 Toyota Fore Runner SUV;
>
> f. the Defendant shall have full and sole ownership of his business Serenity Care;
>
> g. the parties shall each retain ownership of those assets in their possession and names and the other party shall have no claim over those assets.
>
> 3. All debts acquired in the names of the parties shall be the responsibility of the party in whose name the debt was incurred and the other party shall have no responsibility for repayment of those debts.

[7] On June 7, 2011, the plaintiff filed a notice of application to have removed the Caveats and Certificates of Pending Litigation the defendant had filed against the two Wilson Drive properties. In her affidavit in support of her application to have them removed, the plaintiff deposed, in part:

> 5. During the week of May 30, 2011, after the Reasons for Judgment were issued, I went to the Land Titles Office and asked that the Caveats and the Certificates of Pending Litigation that were filed by the Defendant against 91 and 88 Wilson Drive be removed.
>
> 6. I plan to increase my Line of Credit with the CIBC so that I can consolidate my debts and relieve the huge financial strain that I am under. The current amount outstanding on my Line of Credit and Credit Cards is $72,349.94... I need to increase my line of credit to deal with the financial mess. In the meantime, the Defendant was collecting rent from 88 Wilson Drive after moving from the property in December 2010, so he has been able to utilize that property to assist his financial position while I have not.
>
> 7. I was informed by Land Title Office staff that the Defendant either has to remove the Caveats and withdraw the Certificates of Pending Litigation, or

> alternatively, I have to come to Court directing the Land Titles Office to complete this request.

[8] The defendant refused the plaintiff's request to remove the Caveats and Certificates of Pending Litigation.

[9] The plaintiff's application, which was directed to the Registrar of the Yukon Land Title Office, sought the following order:

> 1. The Yukon Land Titles Office be directed to:
>
> a) Remove the Certificate of Pending Litigation and withdraw the Caveat registered by the Defendant against 91 Wilson Drive. [Legal description omitted.]
>
> b) Remove the Certificate of Pending Litigation and withdraw the Caveat registered by the Defendant against 88 Wilson Drive. [Legal description omitted.]

[10] The plaintiff's application to remove the Caveats and Certificates was not heard until after the defendant had brought his appeal from the order at trial dividing the property and the plaintiff had filed her cross-appeal from the order respecting responsibility for payment of the debts. The defendant's appeal takes issue with, among other things, Justice Groves' determination concerning the prenuptial agreement and the ownership of the Wilson Drive properties. In her cross-appeal, the plaintiff alleges that the judge erred in ordering that debts in her name are her sole responsibility because the prenuptial agreement, which he found to govern, provides that certain debts, including a CIBC line of credit and a CIBC credit card, are to be jointly shared by the parties regardless of whose name the debts are in.

[11] Shortly after the appeal and cross-appeal had been brought, the defendant brought an application in the Yukon Court of Appeal, in Chambers, seeking a stay of execution of the trial order made by Justice Groves. On June 30, 2011, Justice Bennett granted a limited stay, with respect to the 88 Wilson Drive property, pending the determination of the appeal, but made no order with respect to 91 Wilson Drive. Justice Bennett's order respecting 88 Wilson Drive was that the plaintiff should neither sell nor take out a second mortgage on that property.

[12] The application the plaintiff had originally filed in June 2011 after the trial order had been made, to have the Caveats and Certificates of Pending Litigation removed against the two Wilson Street properties, was then brought on for hearing before Justice Groves. In the intervening period, further affidavit material had been filed by the parties.

[13] On August 3, 2011, Justice Groves made the following order :

> THIS COURT ORDERS THAT:
>
> 1. The Registrar or appropriate officer of the Yukon Land Titles Office shall remove any Caveat or Certificate of Pending Litigation registered by the Defendant David Hedmann against 91 Wilson Drive ... .
> [Legal description omitted.]
>
> 2. The Application to remove the caveat or Certificate of Pending Litigation from 88 Wilson: [Legal description omitted.] is dismissed.
> [Emphasis added.]

[14] On August 9, 2011, the defendant filed a Notice of Appeal from the order made by Justice Groves on August 3, 2011, under Yukon Court of Appeal File No. 11-YU683. On the same day, the defendant filed a Notice of Motion seeking the relief set out in para. 1 of these reasons, i.e., that "the order of Judge Groves made in hearing on Wednesday, August 3, 2011 in the Yukon Supreme Court be either set aside in its entirety or set aside until such time as the Appellant's appeal in this matter is ruled on by the Court of Appeal".

[15] In the motion, the defendant first asks that Justice Groves' order of August 3, 2011 be set aside in its entirety. A single judge of the Yukon Court of Appeal does not have jurisdiction to set aside an order made in the trial court.

[16] The alternative relief sought by the defendant is to set aside Justice Groves' order "until such time as the Appellant's appeal in this matter is ruled on by the Court of Appeal". While not identified or labelled as such on his application, the alternative relief the defendant seeks is a stay of Justice Groves' order of August 3, 2011 until the appeal of the trial order has been decided. However, the alternative relief sought does not differ in substance from the defendant's earlier stay application, which was considered and determined by Justice Bennett.

[17] The defendant argues that the August 3, 2011 order of Justice Groves is in conflict with the order of Justice Bennett because her order is silent with respect to the property at 91 Wilson Drive. That argument cannot be sustained in light of what was at issue on the earlier stay application and what Justice Bennett said in her oral reasons.

[18] The defendant's other argument is that some restriction should have been placed on the 91 Wilson Drive property, so that the plaintiff could not encumber it before the appeal was heard. That argument is without merit.

[19] On the defendant's stay application that came before Justice Bennett, the plaintiff had filed an affidavit in which she stated her reasons for needing to remortgage the 91 Wilson Drive property. The affidavit material showed that the CIBC had suggested to the plaintiff that she remortgage 91 Wilson Drive as a means of getting her debts under control. The plaintiff further deposed that she did not intend to sell the 88 Wilson Drive property and did not need to encumber that property if she was able to remortgage 91 Wilson Drive.

[20] On the case authorities, to which Justice Bennett referred, the defendant could not expect both properties to be subject to a stay order pending determination of the appeal. Justice Bennett said, in part:

> [9] Section 13 of the Yukon *Court of Appeal Act,* R.S.Y. 2002 c. 47, provides that "[e]xecution of the judgment appealed from shall not be stayed except under order of a judge of the Supreme Court or the Court of Appeal, or a judge thereof, and on those terms that are just."
>
> [10] In *B.C. (Milk Marketing Board) v. Grisnich* (1996), 70 B.C.A.C. 142, 50 C.P.C. (3d) 249 at para. 7 (Hinds J.A. in Chambers) outlined the test for granting a stay:
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> > The three stage test enunciated *in Metropolitan Stores (M.T.S.) Ltd. v. Manitoba Food & Commercial Workers, Local 832,* [1987] 1 S.C.R. 110, 38 D.LR. (4th) 321 and re-affirmed in *RJR - MacDonald* has frequently been interpreted as requiring an applicant to show the following:
> >
> > (1) that there is some merit to the appeal in the sense that there is a serious question to be determined;
> >
> > (2) that irreparable harm would be occasioned to the applicant if the stay was refused;

> (3) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

[11] Mr. Hedmann submits that his appeal has merit. He has filed an affidavit which outlines his many arguments with respect to alleged errors made by the trial judge. He further submits that he will suffer irreparable harm if a stay is not granted. At para. 73 of his affidavit, he states:

> ...This matter involves substantial family assets including two houses... with a combined value of about one million dollars. There is a housing shortage, some say crisis, in Whitehorse. The features are few properties for sale and rapidly increasing house prices. If the Respondent were to sell or encumber one or both of the real estate assets, she could end up with insufficient funds to pay a divorce settlement, and it would be extremely difficult for me to find a comparable property to get back into the market.

[12] In essence, Mr. Hedmann was collecting the rents from 88 Wilson Street. If the order stands, then Ms. MacNeil will be entitled to collect the rents and rent those properties out. Indeed, on the strength of the judgment, she has rented one of the properties to her son. Mr. Hedmann says that the inconvenience to him if the stay is refused will be greater than the inconvenience to Ms. MacNeil if the stay is granted. He submits that Ms. MacNeil's household income is approximately $300,000 per annum and that her claim of financial hardship is not credible.

[13] Ms. MacNeil submits that the balance of convenience lies with her because she has rented the property now to her son. She is paying substantial debts which, in her submission, were family debts and are the subject of her cross-appeal. She submits that without the ability to take out a second mortgage on at least one of the properties, she cannot keep her head above water financially. She submits that it is not appropriate for the appellant to receive the rent from 88 Wilson because she is entitled to the fruits of her judgment. She says that she is not going to sell 88 Wilson, she is not going to leave the Yukon and she also does not need to encumber 88 Wilson if she is allowed to get a second mortgage on 91 Wilson.

[14] A successful litigant is entitled to the fruits of their judgment unless the interests of justice require them to be withheld. In terms of merit, there is a very low threshold to meet and, in my respectful view, Mr. Hedmann has met that threshold. The issue comes down to irreparable harm to Mr. Hedmann and the balance of convenience. As noted, it is of main concern to Mr. Hedmann that Ms. MacNeil will sell the property. As indicated, she says she is not, but she wants to collect the rent.

[15] In terms of balance of inconvenience, in my respectful view, to address the concerns raised by Mr. Hedmann the solution is that there be a very limited stay of execution, which is this: if Ms. MacNeil wishes to sell 88 Wilson, the rental property, or encumber it further, she must have an order of this Court or of the Supreme Court of the Yukon. Otherwise she is entitled to her judgment pending appeal. What this means is that Ms. MacNeil cannot sell 88 Wilson or take out a second mortgage on 88 Wilson unless the court orders otherwise. That leaves her the option of applying to the court for an

> order if it is necessary. Otherwise, the property is preserved should Mr. Hedmann be successful on the appeal and that, in my respectful view, addresses both the main issues raised.
> [Emphasis added.]

[21] The order Justice Groves made on August 3, 2011 is not in conflict with Justice Bennett's order. Justice Groves concluded, correctly in my view, that Justice Bennett had not made any order respecting 91 Wilson Drive and, as a result, there was no impediment to his making the order he did for the removal of the Caveat and Certificate of Pending Litigation against that property.

[22] Justice Bennett granted what she described as a "limited stay" respecting 88 Wilson Drive. The Caveat and Certificate of Pending Litigation against that property prevents the plaintiff from selling or encumbering it unless an order is made to remove them. Justice Bennett left it open to the plaintiff to apply in the trial court to have the Caveat and Certificate against 88 Wilson Drive removed. Justice Groves concluded on the material before him that the filings against that property should not be removed pending determination of the appeal from the trial judgment. The order he made is not inconsistent with Justice Bennett's order. There is no reason for the defendant to complain about the order Justice Groves made on August 3, 2011 respecting 88 Wilson Drive for the order favours him.

[23] For the reasons stated, the defendant's application is dismissed with costs. I fix the costs at $500.

"The Honourable Madam Justice Rowles"