# SUPREME COURT OF YUKON

Citation: *Sherman v. McInroy*, 2012 YKSC 77 Date: 20121002
Docket: S.C. No. 08-A0176
Registry: Whitehorse

BETWEEN:

**TERRY SHERMAN**

**PLAINTIFF**

AND:

**PATRICK McINROY AND CATHERINE McINROY**

**DEFENDANTS**

Before: Madam Justice M.A. Maisonville

Appearances:
André Roothman Counsel for the Plaintiff
Nicholas Weigelt Counsel for the Defendants

**REASONS FOR JUDGMENT**
**DELIVERED FROM THE BENCH**

[1] MAISONVILLE J. (Oral): Before the Court is an application brought by Terry Sherman for the sale of a house and the enforcement of a settlement agreement pursuant to Rule 46 of the Yukon *Rules of Court* and s. 14 of the *Judicature Act*, R.S.Y. 2002, c. 128. The defendants, Patrick and Catherine McInroy, defend the application, arguing that the application is an effort to gain complete control of the sale of the house.

**BACKGROUND**

[2] The background of this application is that the defendants purchased a lot in Whitehorse at 14 Adit Lane, more particularly described as lot 964, in the Copper Ridge subdivision in the city of Whitehorse in the Yukon Territory under plan 2004-0087. In the spring of 2007 the defendants approached Mr. Sherman, who was a contractor/home builder, to build their dream home. No written agreement was entered into by the parties, and the agreement was done by a handshake. Regrettably, as is often the case when there are no written terms, the parties had a falling out and the McInroys ceased any payments to Mr. Sherman.

[3] It is not in dispute that the home was built, and that the defendant has been occupying the home since the construction. Presently, it is being occupied by a tenant, although the McInroys argue that they should have been able to be in the home earlier in August 2007 as opposed to December of that year. They also take issue with numerous other matters relating to the construction. They ceased payments to the plaintiff, Mr. Sherman. Ultimately, an action was brought in court. On November 29, 2010, a settlement conference was held between the parties, presided over by Mr. Justice Veale.

[4] There is no dispute that at that meeting a settlement was arrived at between the parties. In effect, the settlement is for the sale of the property, and the division of the proceeds of the sale. On December 14, 2010, the McInroys and Mr. Sherman signed the settlement agreement which had been prepared by counsel for the McInroys. It is a detailed agreement, four pages in length. In the recitals, it states:

> The parties have agreed to settle the action by jointly remediating a number of problems with the home and putting the home on the market for sale in order to minimize their respective losses.

While most of the details were clear, there was provision for the parties to resolve issues; for instance, relating to the price for sale, and generally otherwise if made in writing and agreed to between the parties.

[5] The house was listed at $875,000. The reserve price was to be $775,000. Earlier in February of 2011, an appraisal by the realtor, Dana Klock, had appraised the property at approximately $840,000. In her affidavit, she deposed the home sale price should be $845,000. Because this was very close to the $50,000 window identified in the settlement agreement, the term being “The home shall be listed at the sale price ($874,000) subject to the FMV [being Fair Market Value] and in the event there is a discrepancy of more than $50,000, the Parties shall negotiate a new Sale Price”, there was no change to the listing price as the Court understands. At present, Ms. Klock is the tenant in the home. It was listed for six months, commencing February 2011 but the listing was never renewed.

**CASELAW**

[6] The applicable law is to be found in the decision of *Baldissera* v. *Wing*, 2000 BCSC 1788, (2003 BCCA 276, Appeal dismissed),a decision of Madam Justice Bennett, as she then was, of the British Columbia Supreme Court, in which she notes at para. 12 the decision of MacFarlane J., as he then was, of the British Columbia Supreme Court in *McKenzie v. McKenzie* (1975), 55 D.L.R. (3d) 373 (B.C.S.C.). In *McKenzie,* MarFarlane J. refers to the analysis of Mr. Justice Smith in *Roberts* v.

*Gippsland Agricultural & Earth Moving Contracting Company Pty. Ltd.*, [1956] V.L.R. 555 at 562 – 565, regarding when the Court of Chancery would enforce the settlement agreements. In the suit compromised, the Court held that:

> … the Court of Chancery would ordinarily leave a party to proceed in a fresh action if the settlement involved matters extraneous to the suit compromised, but would enforce the agreement in the suit if it related to the granting of the whole or part of the relief claimed; and if no substantial question was raised as to the terms, validity or enforceability of the agreement.

[7] Bennett J., in *Baldissera*, additionally reviewed *Robertson* v. *Walwyn Stodgell Cochrane Murray* (1988), 24 BCLR (2d) 385; [1988] B.C.J. No. 4885 (B.C.C.A.).

Mr. Justice Lambert, for the Court, held that, page 396 of that decision:

> The law in relation to the enforcement of settlement agreements by stays of proceedings brings together the principles of contract law, principles of the law of agency as they apply to barristers and solicitors, rules of equity as they apply to discretionary remedies, and rules of procedure as they apply to the pronouncement and entry of consent orders. In each case, the issues between the parties must be dealt with in accordance with those principles. The effectiveness and the enforcement of settlement agreements does not constitute a separate field of law to which the ordinary principles of contract law, agency, and equity, and the ordinary rules of procedure, do not apply.

Bennett J. continues citing from Robertson and reviews at para. 28:

> A review of the Settlement Agreement in this case does not raise any concern that the Settlement Agreement is unfair, vague or otherwise unenforceable. The only issue presented …

And her ladyship goes on to note that in that particular case there was a refusal to sign the settlement agreement itself.

**DISCUSSION**

[8] In this case, the settlement agreement is signed by all parties. The matter is defended on the basis that the terms of the settlement agreement are in fact more specific and particular than reflected in the agreement, and that in accordance with the existing case law, it would not be proper to enforce the settlement agreement as the terms were to include only a six-month term for the listing of the home. Of note, the settlement agreement itself is silent on the period of the listing. It is also defended on the basis that the equity does not lay with the plaintiff who does not come to court with clean hands. In particular, there are two matters relied upon and those are that he appended an improper document being a summary of the showings of the house, and secondly, that he had actually received a valuation when he deposed that he had not. Mr. Roothman, before the Court today, explained that that was a problem he must bear of his own, in that he failed to bring the valuation to the attention of Mr. Sherman. As for the other difficulty, that was explained in it being in the nature of an email copy. I do not find that those matters and the other matters that are raised in the affidavit materials of the defendants are such that they would preclude the plaintiff in equity from bringing an action to enforce the settlement. I am mindful there is the affidavit of the defendant, Catherine McInroy, who deposed at the settlement conference before Veale J. a six-month listing was discussed. As noted, however, the parties never made that a term of the settlement agreement.

[9] This Court has the jurisdiction to enforce the settlement pursuant to the provisions of the *Judicature Act,* at s. 14. I will not quote that section in its entirety, but

at s. 14(3) “a party … may apply to the Court by motion in a summary way for a stay of proceedings in the cause or matter, either generally or so far as may be necessary for the purpose of justice, and the Court shall thereupon make any order that shall be just.” This section mirrors the *Law and Equity Act* section which was under consideration by Madam Justice Bennett in the case that I have referred to. I also am mindful, here, of the defendants’ submission that they are now agreeable to having the house listed, which resolves that aspect of the litigation between the parties. I find in all the circumstances it is appropriate to order the sale of the property.

[10] The sole issue becomes that of price, and before the Court the submission was made that there should be a proper up-to-date valuation. Both parties agree there should be an up-to-date valuation. The earlier valuation was conducted in February 2011 by Ms. Klock. I agree with the parties there should be an up-to-date valuation. There shall be an order for sale of the said property. I am mindful that there have been submissions application for the conduct of the sale being with the plaintiff akin to the plaintiff taking complete control of the sale, but I do not agree. Proper terms can ensure the sale is fair and equitable and reflects the original settlement agreement. Conduct of the sale shall be with Mr. Sherman on the following conditions, and they will mirror the settlement agreement except in terms of the time and the valuation. There shall be:

1. A fair market valuation prepared, and the realtor to prepare the valuation shall be decided between the parties on the basis of the plaintiff selecting three realtors from Coldwell Banker and submitting those to counsel for the defendants, and from those three realtors the defendants shall pick one. That realtor shall then prepare the valuation.

2. The house can be listed for a price to be no less than $30,000 above the appraised value.

The listing price shall be determined by the court after the valuation and further submissions. Otherwise, the terms of the Settlement Agreement are to be as reflected in the order of the Court. There shall still be a reserve price. I order that:

3. The parties shall, upon valuation, contact trial scheduling and arrange for a further appearance in order to move forward with the listing.

There is no further remediation required, so the obligations of the home owner, as set out in the settlement agreement, have been taken care. There is no CPL registered with the property any longer, so that is not an issue. Respecting the final sale price:

4. The sale proceeds are to be 50 percent to the contractor, 50 percent to the home owners after taking into account the first payment to the home owners.

[11] THE COURT: Is the mortgage still $600,000?

[12] MR. WEIGELT: My Lady, that's not the mortgage. It was a formula arrived upon during the settlement that the profit above $600,000 was going to be subject to the 50-50 split.

[13] THE COURT: Have the figures changed substantially?

[14] MR. WEIGELT: Well, that $600,000 was arrived upon and agreed to on the basis of a number of factors, primarily the overall cost to the defendants, but that was something that was --

[15] THE COURT: Mr. Roothman, you did not address this in your submissions, so.

[16] MR. ROOTHMAN: Well, circumstances have changed substantially. Given the lapse of time, the rental income that the defendants have received from the income property, the fact that my client had no benefit; that has changed the whole equation.

[17] THE COURT: Well, I do not have any evidence before the Court. So today while there is going to be an order for the sale, the parties can make submissions on the first amount to be paid to the McInroys, the home owners.

5. Mr. Sherman will have the conduct of that sale, however the particulars of that will be determined in terms of the final sale price as well the payment of the sale proceeds between the parties will be determined by the court following submissions by the parties.

I will hear further submissions on this matter and shall remain seized of this, and if there are to be any further changes, those are to be addressed to the Court after the valuation. I ask that the parties contact the trial coordinator in order to arrange for further attendance by telephone, upon written submissions. I direct there will have to be written submissions on the final sale price, and on the payment sale's proceeds. Is there anything else?

[18] MR. ROOTHMAN: Costs.

[19] THE COURT: I am not going to deal with that at this time because this matter is not over.

[20] MR. ROOTHMAN: Very well.

[21] THE COURT: And I note also, Mr. Weigelt really did not get a chance to address that. So, in your future submissions as well, you can address costs, Mr. Weigelt.

[22] MR. WEIGELT: Very well.

[23] THE COURT: Thank you. Is there anything else?

[24] MR. ROOTHMAN: Nothing from --

[25] THE COURT: So there should be a time frame for when you are going to put the - I do not know when they will have time for it in court, but in order to get going on the valuation - to provide the name of three realtors on or before Friday at 4:00 p.m. Next Friday. Madam Registrar, what day will that be?

[26] THE CLERK: October 12.

[27] THE COURT: Thank you. So that will be on or before October 12, and then the McInroys are to advise which of the realtors on or before the Friday following that. So that would be --

[DISCUSSION RE: DATE]

-- the 19th. Thank you. You are to provide that by October the 12th --

[28] MR. ROOTHMAN: Very well.

[29] THE COURT: -- and they will select a realtor from the names on or before four o’clock, October 19th.

[30] MR. ROOTHMAN: And then we can bring the matter back for you to deal with it in that time?

[31] THE COURT: Yes. Because we need to have clarification of those issues that, in terms of the final division of sale price over the $600,000. Mr. Weigelt should be able to make his submissions in that regard, although I have made that order, respecting the listing price, to be no less than $30,000 above the valuation.

[32] MR. ROOTHMAN: Very well. The further appraisal, should that be provided in affidavit -- well, as exhibit to a further affidavit to be filed?

[33] THE COURT: Yes, and with everything, it should be in writing so that they will deal effectively and will be able to carry on with this effectively by telephone.

[34] MR. ROOTHMAN: Very well then.

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MAISONVILLE J.