COURT OF APPEAL OF YUKON

Citation: *Murphy v. Szulinszky*,
2016 YKCA 16

Date: 20161130
Docket: 15-YU777

Between:

Joanne Murphy

Respondent
(Plaintiff)

And

Joseph Szulinszky

Appellant
(Defendant)

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Charbonneau

On appeal from: An order of the Supreme Court of Yukon, dated February 19, 2016 (*Murphy v. Szulinszky*, 2016 YKSC 18, Whitehorse Docket No. 14-B0112).

The Appellant appearing In Person: J. Szulinszky

Counsel for the Respondent: C.J. Petter

Place and Date of Hearing: Whitehorse, Yukon
November 15, 2016

Place and Date of Judgment: Vancouver, British Columbia
November 30, 2016

Written Reasons by:
The Honourable Madam Justice Charbonneau

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Willcock

Summary:

Mr. Szulinszky appeals the trial judge's division of family assets and requests to adduce fresh evidence. Mr. Szulinszky and Ms. Murphy were in a common-law relationship for about twenty years. In a summary trial, the judge found Mr. Szulinszky was unjustly enriched by Ms. Murphy and granted a restraining order against Mr. Szulinskzy. Mr. Szulinskzy was self-represented throughout the proceedings. Held: Appeal dismissed. Mr. Szulinskzy has not met the test to adduce fresh evidence. The trial judge did not err in the remedy he awarded to Ms. Murphy.

Reasons for Judgment of the Honourable Madam Justice Charbonneau:

INTRODUCTION AND BACKGROUND

[1] This is an appeal from the decision of the Yukon Supreme Court following a summary trial held pursuant to Rule 19 of the *Rules of Court*. The subject of the trial was the division of family assets between the appellant, Joseph Szulinszky, and the respondent, Joanne Murphy, following the breakdown of their common-law relationship of some twenty years.

[2] Ms. Murphy initiated proceedings by filing a statement of claim on March 19, 2015. Mr. Szulinszky filed an appearance on March 27, 2015.

[3] The matter was first spoken to in chambers on March 31, 2015. Both parties appeared on that date and were self-represented. Given the type of relief Ms. Murphy was seeking and the documents filed to that point, the presiding judge was unable to deal with the matter in a substantive way. He explained to Ms. Murphy the procedural steps she needed to take to have her claim addressed by the Court. He also told both parties that they should seek legal advice.

[4] Ms. Murphy retained counsel in July 2015. On January 13, 2016, she filed an amended statement of claim. On January 28, 2016, the amended statement of claim, a detailed affidavit sworn by Ms. Murphy, an affidavit of documents and a financial statement were served on Mr. Szulinszky. He was also served with a notice of application to proceed by way of summary trial. Mr. Szulinszky did not file any material in response.

[5] Ms. Murphy's summary trial came before the Yukon Supreme Court on February 19, 2016. The presiding judge had dealt with the matter in chambers in March 2015 and, as such, was familiar with the history of the matter and what had occurred at that earlier appearance.

[6] At the start of the proceedings, the judge had an exchange with Mr. Szulinszky about Mr. Szulinszky's intentions. Toward the end of that exchange, the judge specifically asked Mr. Szulinszky whether he was asking for an adjournment of the trial. Mr. Szulinszky said that he was not.

[7] The judge determined that the matter could proceed by way of summary trial. After hearing submissions from the parties, he granted Ms. Murphy the relief that she was seeking through the application of the doctrine of unjust enrichment. He also granted Ms. Murphy's application for a restraining order against Mr. Szulinszky. The judge gave brief oral reasons that day, followed by detailed reasons for judgment filed on March 9, 2016: *Murphy v. Szulinszky,* 2016 YKSC 18.

[8] Mr. Szulinszky now appeals that order. He has sworn an affidavit setting out his version of the parties' respective financial contributions during the relationship. He disputes most of Ms. Murphy's evidence on this subject and claims that he paid for all the household expenses and all the assets acquired during the relationship.

[9] Mr. Szulinszky seeks to have his affidavit admitted as fresh evidence on this appeal. He also asks that the trial decision be overturned.

ANALYSIS

A. The Application to Adduce Fresh Evidence

[10] An appeal is neither an opportunity to have the case re-tried nor a second opportunity for the parties to present evidence. On the contrary, the admission of fresh evidence on appeal is an exceptional measure. The governing principles on this issue are well-established and were summarized, more than thirty years ago, by the Supreme Court of Canada in *R. v. Palmer,* [1980] 1 S.C.R. 759 at p. 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. [citations omitted.]

[11] Mr. Szulinszky's version of how finances were handled during his relationship with Ms. Murphy and how their assets were acquired was, obviously, available to him before the matter proceeded to trial. Similarly, the documents attached as exhibits to his affidavit were in large measure in his possession or within his control when he was served with Ms. Murphy's materials.

[12] That being so, the fundamental problem with Mr. Szulinszky's application to adduce fresh evidence is that virtually all the evidence he now seeks to adduce was available to him at trial. He simply did not take the necessary steps to present it to the trial court.

[13] Mr. Szulinszky was a self-represented litigant throughout these proceedings, but he understood enough about the process to take certain steps in this litigation: he filed an appearance in 2015 shortly after Ms. Murphy's statement of claim was filed; he appeared before the Court in March 2015 and February 2016; and he assembled comprehensive materials in the context of this appeal.

[14] Mr. Szulinszky was on notice for a long period of time that Ms. Murphy wished to settle the division of their property. He was in court in March 2015 when the judge explained to Ms. Murphy what she needed to do to move her case forward. He also heard the judge advise both parties to seek legal advice.

[15] Whatever steps Mr. Szulinszky took after the March 2015 appearance, there is no indication that he made any attempt, after he was served with the application and supporting documents in January 2016, to contact Ms. Murphy's counsel to

discuss an adjournment of the matter to give him time to assemble materials. Nor, at the February 2016 appearance, did he ask for an adjournment. At one point during his exchange with the judge, he referred to the proceedings as “a farce”.

[16] Even though Mr. Szulinszky is a self-represented litigant that does not mean that he is exempt from the law, the rules of evidence or the rules of procedure. Self-represented litigants must, of course, be treated fairly. At the same time, courts have a duty to ensure that fairness is extended to all parties: *Ferstay v. Dywidag Systems International, USA Inc.,* 2009 BCSC 833 at para. 21.

[17] Mr. Szulinszky does not have a satisfactory explanation for failing to file his evidence when he should have, prior to trial. He had adequate notice of the proceedings. He appears to have simply chosen not to respond to them.

[18] In my opinion, the criteria for admission of fresh evidence are not met in this case.

B. The Merits of the Appeal

[19] The standard of review on a question of law is correctness.

[20] The standard of review with respect to findings of fact is that of palpable and overriding error. A palpable and overriding error is an error so obvious that it can be plainly seen: *Housen v. Nikolaisen*, 2002 SCC 33.

[21] I am unable to find any error of law in the judge’s legal analysis. With respect to the doctrine of unjust enrichment, he relied on *Kerr v. Baranow,* 2011 SCC 10, the leading authority on the issue. He did not misstate any of the principles set out in that case.

[22] As far as findings of fact, the judge concluded that Ms. Murphy suffered a significant financial shortfall as a result of her relationship with Mr. Szulinszky. This conclusion was amply supported by the evidence.

[23] The judge relied on evidence that was detailed, uncontradicted, and in some respects, supported by documents. There is no indication that he misapprehended any aspect of that evidence.

[24] I am unable to find any error in the judge's factual findings, let alone an error that could be characterized as so obvious that it can be plainly seen.

[25] Finally, in considering the remedy granted to Ms. Murphy, the judge carefully reviewed the evidence and accounted for Mr. Szulinszky's contributions. I find no error in how he crafted the remedy. It was under the circumstances the only remedy that could realistically be granted. I note that based on the judge's findings, even this remedy fell short of fully compensating Ms. Murphy for unjustly enriching Mr. Szulinszky.

[26] In my opinion, the judge did not commit any reversible error in deciding this case.

CONCLUSION

[27] I would dismiss the application for admission of fresh evidence. I would also dismiss the appeal.

[28] As Ms. Murphy is the successful party, I would order that she is entitled to her costs of the appeal.

"The Honourable Madam Justice Charbonneau"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Mr. Justice Willcock"