IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Banerjee v. Bisset,*
2009 BCSC 1808

Date: 20091106
Docket: S096406
Registry: Vancouver

Between:

Anand Banerjee

Plaintiff

And:

Anita Juliet Bisset

Defendant

Before: The Honourable Madam Justice Beames

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	A. Thiele
Counsel for the Defendant:	E. Chapman T. Brown
Place and Date of Hearing:	Vancouver, B.C. October 30, 2009
Place and Date of Judgment:	Vancouver, B.C. November 6, 2009

[1] **THE COURT:** The plaintiff and the defendant lived in a common law relationship from 2001 to 2002, and then again, after approximately one year apart, from 2003 until February 2009. They have one son who is now 6 years old.

[2] After the parties separated, they engaged in a collaborative law process. On April 22, 2009, the parties, Deborah Brakeley and Ellen Shapiro, the latter two of whom as I understand it are separation coaches, signed an agreement entitled, "Collaborative Separation and Divorce Participation Agreement". I will refer to that agreement as the *Brakeley Agreement*.

[3] On May 20, 2009, the parties and their respective collaborative law lawyers, Kallen Fong and Lisa Alexander, signed an agreement entitled, "Collaborative Law Participation Agreement", which I will refer to as the *Alexander Agreement*.

[4] On August 6, 2009, the parties and their lawyers had a lengthy four-way meeting. On August 7, 2009, and then again on August 21, 2009, the defendant gave notice, through her lawyer, that she was withdrawing from the collaborative law process.

[5] Subsequently, the plaintiff commenced this action. On September 24, 2009, the plaintiff's counsel prepared a notice of motion, pursuant to Rule 18A, seeking a declaration that the parties had entered into a valid and binding agreement on August 6, 2009, dealing with all property and spousal support issues. The defendant filed a notice of motion as well, seeking some procedural relief.

[6] The matter came before the court on October 2, 2009. Some procedural relief was granted at that time with regard to the pleadings and with regard to the exchange of Form 89 financial statements. The balance of the motions were adjourned to October 26, and, if necessary, October 30, 2009, for hearing. On October 13, 2009, the defendant prepared a second notice of motion seeking an order that all or parts of the plaintiff's Affidavit # 1, which was sworn on September 24, 2009, be struck, and directions regarding the implementation of the *Alexander*

Agreement be given, including whether evidence from, or derived from, the collaborative counsel can be received or admitted.

[7] There was no judge available to hear this matter on October 26. On October 30, 2009, the parties appeared before me. It was agreed that I would hear only the issue with regard to the admissibility of evidence, including all or parts of the plaintiff's affidavit, and also the affidavit evidence of Nancy Cameron with regard to the collaborative law process and practice generally, which evidence is objected to by counsel for the plaintiff. The plaintiff's application for summary judgment was adjourned generally, as I understand it, and the defendant's notice of motion dated October 1, 2009, to the extent, if at all, that it has not been dealt with in the past, will be heard at some later time. It was not dealt with by the parties in their submissions before me.

[8] In summary form, the defendant's position is that pursuant to the collaborative law agreements, the parties agreed that there would be no settlement concluded unless it was put in writing. The defendant says that paragraphs 21 through 45 of the plaintiff's Affidavit # 1 are inadmissible because they make reference to matters which are confidential pursuant to the parties' collaborative law agreements; because they contain reference to the negotiating positions taken by the parties leading up to the alleged settlement contrary to the principles in *Fraser v. Houston*, 2005 BCSC 715 and *Cadinha v. Chemar Corp.*, [1995] B.C.J. No. 755 (S.C.); and because, in some instances, the plaintiff is providing hearsay evidence which is not admissible on a summary trial.

[9] The plaintiff says that the parties did reach a settlement at the meeting of August 6, 2009; that the collaborative law agreements do not preclude evidence to prove, as one could in the case of an oral agreement to settle a litigation matter, that an agreement had been reached; and that the plaintiff's evidence should be available to the court when the plaintiff's Rule 18A application is heard. With regard to the evidence of Ms. Cameron, the plaintiff says that it is not relevant or helpful with regard to the issues between the two parties now before the court.

[10] I will deal first with Affidavit # 1 of Ms. Cameron. In my view, this case turns, or will turn, on what transpired between the plaintiff and the defendant and their counsel at the time, what the plaintiff and the defendant understood, and what the plaintiff and the defendant agreed upon. It is not a case in which the collaborative law process is on trial, nor a case which has the potential to "sound the death knell" of the collaborative law process, as was argued before me. I do not consider the evidence of Ms. Cameron with regard to the history of collaborative law, generally or in Vancouver, the standards being adopted internationally for collaborative law, standard collaborative participation agreements, or statutes being passed in other jurisdictions with regard to collaborative law, to be necessary evidence, nor relevant to the determination of the issues in this case.

[11] I turn now to the evidence of the plaintiff with regard to the parties' negotiations, and particularly the events of August 6, 2009, on which date he alleges an agreement was reached.

[12] It is clear that evidence of an alleged settlement agreement having been reached by the parties or by their counsel is normally admissible, as are lawyers' notes of the terms of purported agreements; see, for example, *Frolick v. Frolick*, 2007 BCSC 84; *Baldissera v. Wing*, 2000 BCSC 1788; *Sekhon v. Khangura*, 2009 BCSC 670; and *Lunardi v. Lunardi*, [1988] O.J. No. 1882. The issue in this case, however, is whether the parties agreed that different rules would apply to their negotiations, or, more properly, any settlements they may reach.

[13] The *Brakeley Agreement* contains the following provisions:

> GOAL OF COLLABORATIVE SEPARATION & DIVORCE
>
> The goal of Collaborative Separation & Divorce is to help the separating/divorcing couple work successfully within the Collaborative Law structure to achieve a positive resolution and minimize the negative economic, social, and emotional consequences that families often experience in the traditional adversarial separation and divorce process.
>
> In order to accomplish this goal, three independent disciplines work together as an interdisciplinary team to integrate the legal, emotional, and financial aspects of separation/divorce.

> CONFIDENTIALITY
>
> 1. Both Parties agree to sign confidentiality waivers with the Collaborative Separation/Divorce Coaches to waive privilege with each Collaborative lawyer or Financial Specialist involved in the process...
>
> 2. All materials without these specific waivers remain closed and confidential...unless there is an agreement, e.g., a Parenting Plan, made between both parties that is signed, dated, and witnessed.
>
> ...
>
> 4. Should either [P]arty elect to move from the Collaborative Process into a court process, all materials, including all content (both written and oral) of coaching sessions, remain confidential and may not be used in any court proceedings
>
> ELECTION TO TERMINATE
>
> If either Party decides that the Collaborative Separation/Divorce process is no longer viable and elects to terminate the status of the case as a Collaborative Separation/Divorce matter, s/he agrees, in writing, to immediately inform the other Party, their respective Coaches and lawyers.

[14] There is no evidence before me to suggest that the *Brakeley Agreement* was terminated at any time before the defendant gave notice in early and late August 2009 that she was withdrawing from the collaborative law process. The *Brakeley Agreement* specifically contemplated that the parties would involve other professionals, including lawyers, in their collaborative process.

[15] The *Alexander Agreement* contained the following terms:

> 1. Purpose
>
> The primary goal of the Collaborative Law Process is to settle the outstanding issues in a non-adversarial manner. The Parties aim to minimize, if not eliminate, the negative economic, social and emotional consequences of protracted litigation to themselves and their family. The Parties have retained Collaborative lawyers to assist them in reaching this goal.
>
> ...
>
> 9. No Court Intervention
>
> Unless otherwise agreed, prior to reaching final agreement on all issues, no writ and statement of claim will be filed or served, nor will any other motion or document be prepared or filed which would initiate court intervention.
>
> ...

11. Withdrawal of Party from Collaborative Law Process

If a Party decides to withdraw from the Collaborative Law Process, prompt written notice shall be given to the other [P]arty through his or her lawyer. Upon termination of the Collaborative Law Process by a Party or a lawyer, there will be a thirty (30) day waiting period (unless there is an emergency) before any court hearing, to permit the parties to retain new lawyers and make an orderly transition. All temporary agreements will remain in full force and effect during this period. The intent of this provision is to avoid surprise and prejudice to the rights of the other Party. It is therefore mutually agreed that either Party may bring this provision to the attention of the Court to request a postponement of a hearing.

...

14. Confidentiality

All communications exchanged within the Collaborative Law Process will be confidential and without prejudice. If subsequent litigation occurs, the Parties mutually agree:

A. that neither Party will introduce as evidence in Court information disclosed during the Collaborative Law Process for the purpose of reaching a settlement, except documents otherwise compellable by law including any sworn statements as to financial status made by the parties;

B. that neither Party will introduce as evidence in Court information disclosed during the Collaborative Law Process with respect to either Parties' [sic] behaviour or legal position with respect to settlement;

C. that neither Party will ask or subpoena either lawyer or any of the Collaborative Professionals to Court to testify in any court proceedings, nor bring on an application to discover either lawyer or any of the Collaborative Professionals, with regard to matters disclosed during the Collaborative Law Process;

D. that neither Party will require the production at any Court proceedings of any notes, records, or documents in the lawyer's possession or in the possession of one of the Collaborative Professionals; and

the parties agree that these Guidelines with respect to confidentiality apply to any subsequent litigation, arbitration, or other process for dispute resolution.

...

16. Enforceability of Agreements

In the event that the Parties require a temporary agreement during the Collaborative Law Process, the agreement will be put in writing and signed by the Parties and their lawyers. If either Party withdraws from the Collaborative Law Process, the written agreement is enforceable and may be presented to the [C]ourt as a basis for an Order, which the Court may make retroactive to the date of the written agreement. Similarly, once a final agreement is signed, if a Party should refuse to honour it, the final agreement may be presented to the Court in any subsequent action.

[16] The plaintiff says that the *Alexander Agreement* does not expressly provide that all agreements between the parties must be in writing and signed, dated, and witnessed. He maintains that an agreement about financial and property matters was reached on August 6, 2009, and that he should be able to give evidence, including his lawyer's handwritten notes and emails between the two lawyers, to prove that agreement.

[17] While the *Alexander Agreement* is, regrettably, not as clear as it should be with respect to the formal requirements of any agreements reached by the parties, particularly given that one of the goals of such agreements is to avoid litigation, I am satisfied that the whole of the agreement, read with its purpose in mind, means that any and all evidence of the parties' negotiations from the parties or their lawyers, including any notes made by the parties or their lawyers, are protected by the confidentiality provisions of the *Alexander Agreement*. Clause 16, although inelegantly drafted, must be interpreted as requiring that any agreement, whether temporary or final, must be put in writing before either party can enforce the agreement.

[18] Although I do not find it necessary to rely upon the *Brakeley Agreement* to assist in interpreting the *Alexander Agreement*, I would have had no hesitation in doing so, given that both agreements were in place concurrently and each expressly contemplated the involvement of other professionals, each of whom might reasonably be expected to have complementary agreements executed.

[19] In choosing to participate in the collaborative law process, and signing the *Brakeley* and *Alexander Agreements*, the parties agreed to have a confidential process; they agreed to forego access to court unless either or both of them withdrew from the collaborative law process; and they agreed that no agreements would be enforceable unless they were agreements in writing. They also, necessarily, agreed to forego disclosing negotiations which stopped short of a written agreement for the purpose of trying to prove that an oral agreement was

made and should be enforced. In other words, they agreed to a different set of rules than apply to normal litigation.

[20] Consequently, I will grant the relief sought in paragraph 1 of the defendant's notice of motion dated October 13, 2009. In the event the parties require any further directions, as contemplated in paragraph 2 of the notice of motion, either counsel may contact the Kelowna Supreme Court Schedulers to set up a telephone conference with me. Unless otherwise directed, I will not require any formal paperwork in that regard.

[21] With regard to costs, I am inclined to leave the costs to be dealt with by the trial judge who will be in the best position to measure success overall, now that the parties are in the litigation process arising as a result of the defendant's unilateral withdrawal from the collaborative law process. However, I am, if counsel think it is appropriate, prepared to hear submissions that are intended to persuade me that my initial view with respect to costs is not correct.

[SUBMISSIONS BY COUNSEL RE COSTS]

[22] THE COURT: With respect to the issue of costs, had particularly the *Alexander Agreement* been clear, I am sure that the plaintiff, himself a lawyer, would not have brought this application on. The fact that it was as contentious as it was is an indication as to how it might have been interpreted differently by different parties. Having heard your submission, Mr. Chapman, my view with respect to costs has not changed, and so the costs will be left to be dealt with, if necessary, by the trial judge if this matter proceeds to trial.

Beames J.