Date: 19980227
Docket: E003385
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

1998 CanLII 4297 (BC S.C.)

BETWEEN:

L[redacted] B[redacted]

PLAINTIFF

AND:

G[redacted] B[redacted]

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE SIGURDSON

Counsel for the Plaintiff:	Stephen G. Herman & John S. Harvey
Counsel for the Defendant:	Angela E. Thiele
Place and Dates of Hearing:	New Westminster, B.C. January 28 & 30, 1998 and February 3, 1998

INTRODUCTION

[1] This matrimonial action was purportedly resolved on September 30, 1997, when the terms of a settlement were described in open court. A dispute has now arisen.

[2] The plaintiff says that there is a binding settlement agreement, seeks to settle the formal court order and applies for ancillary directions to implement the settlement. The defendant says that there is no agreement because there was a common or mutual mistake or because the defendant's counsel at trial did not have authority to enter the agreement the plaintiff asserts. The plaintiff says that if there was a mistake it was unilateral which does not render the agreement voidable and says that no issue of lack of authority arises in these circumstances.

[3] The amount to be repaid to the plaintiff's parents from the sale of a property is what gives rise to the possible mistake.

BACKGROUND

[4] The plaintiff, L[redacted] B[redacted] is 30 years old. The defendant, G[redacted] B[redacted], is 40 years old and is a landscaper. The parties married on May 6, 1989 and separated after seven

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years in January 1996. Their one child M[redacted] was born May 18, 1995.

[5] This action was set for trial in New Westminster on September 29, 1997. According to the plaintiff's written opening "at issue in the proceedings was the identification of family assets, the determination of "family debt", issues of reapportionment, spousal support and child support."

[6] The written opening also contained the following, before describing claims for assets allegedly disposed of by the defendant:

> The family assets, in the view of the plaintiff, consist of the net proceeds from sale of property owned by Mr. B[redacted] on 32nd in White Rock (approximately $166,000 held in trust); the net equity in the former matrimonial home which is subject to an agreement of purchase and sale to complete at the end of October 1997 (approximately $100,000); and an RRSP in the name of the plaintiff of approximately $51,000 and equity in two Osoyoos properties in which the defendant holds a one third interest having approximately $60,000 in equity.

[7] After both parties delivered opening statements M[redacted]. B[redacted] was called to give evidence. The defendant's counsel commenced her cross-examination on the first day of trial. On the next day, the parties apparently reached a settlement. The terms of it were described in open court and the parties were in apparent agreement. Subsequently a formal court order was drafted by the plaintiff's counsel and after receiving some

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comments from the defendant's counsel, the form of it was acceptable to counsel.

[8] There is no dispute that the parties agreed that in full and final settlement of Mrs. B[redacted]'s claims for property and spousal support she would receive the sum of $110,000 and that she would retain in her name the RRSP with an approximate value of $51,000. Mr. B[redacted] also agreed to pay $50,000 in lump sum maintenance for the support of the child who was to be in Mrs. B[redacted]'s custody.

[9] The draft form of the order that was apparently settled between the parties dealt with the manner the payments were to be made by Mr. B[redacted]. It read in part as follows:

> THIS COURT FURTHER ORDERS that the total sum of $160,000 be paid to the plaintiff, L[redacted] B[redacted], as follows:
>
> (i) $60,000 forthwith;
>
> (ii) from the net proceeds of sale, the further sum of $100,000 upon completion of the sale of the premises at [redacted], Langley, B.C. on or about October 28, 1997;
>
> (iii) should the total net sale proceed (sic) be less than $100,000, the defendant, G[redacted] B[redacted] shall pay the difference to the plaintiff, L[redacted] B[redacted], forthwith;
>
> (iv) should the total net sale proceeds exceed $100,000, the difference shall be paid to the defendant, G[redacted] B[redacted] on or about October 28, 1997.

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[10] The settlement, therefore, was that apart from the immediate payment of $60,000, Mrs. B[redacted] would receive, after the sale of the [redacted] Avenue property, the sum of $100,000.

[11] The draft order also dealt with the parties' agreement over termination of child and spousal support and the division of chattels.

[12] The penultimate paragraph of the draft order contained a reference to the indebtedness to Mrs. B[redacted]'s parents, which indebtedness gives rise to the issues on this application:

> THIS COURT FURTHER ORDERS that C[redacted] and M[redacted] W[redacted] be paid the indebtedness owing to them by the defendant, G[redacted] B[redacted], from the sale proceeds of the 4th Avenue property.

[13] Although at first blush these provisions and this settlement agreement appear straightforward, difficulties arose in connection with the amount of the indebtedness owing to Mrs. B[redacted] parents, and the amount of the net proceeds from the sale of the 4[redacted] Avenue property.

[14] Mr. and Mrs. W[redacted] are Mrs. B[redacted]'s parents. To assist Mr. B[redacted] and his wife in purchasing the [redacted] Avenue property, Mr. and Mrs. W[redacted] took out a $120,000 mortgage against their home in favour of Surrey Metro Credit Union. The W[redacted]

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advanced the mortgage proceeds to Mr. B[redacted] to facilitate the purchase of the [redacted] Avenue property. As security, the W[redacted] took a registered one-third interest in the [redacted] Avenue property. The Surrey Metro mortgage, however, remained a charge on the W[redacted] property, not on the [redacted] Avenue property.

[15] The difficulty has arisen over the amount required from the proceeds of the [redacted] Avenue property to satisfy the indebtedness owing to the W[redacted] by Mr. B[redacted] in connection with this transaction.

[16] After the purported settlement, the sale of [redacted] Avenue completed. The dispute arises over whether Mr. and Mrs. W[redacted] should be paid the current amount owing on the mortgage to Surrey Metro Savings registered against their property (the amount of $109,451) or whether the payment to them from the proceeds of the [redacted] Avenue property should include the additional sum of $14,155.89 (made up of interest payments of $12,035.04, a further payment to Surrey Metro Credit Union of $796.91 and legal fees of $843.58 in connection with a foreclosure proceeding initiated by the first mortgagee on the [redacted] Avenue property).

[17] Following the payout of the amount required to discharge the Surrey Metro Credit Union mortgage, the defendant's solicitor held in trust net proceeds of $98,223.49. Mr. B[redacted]

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made up the difference to $100,000 he says as contemplated by the agreement.

[18] If Mr. and Mrs. W[redacted] are to receive past interest payments and costs in addition to the amount to discharge the Surrey Metro mortgage, a further $14,155.89 would have to be paid by Mr. B[redacted] for there to be $100,000 for distribution to Mrs. B[redacted].

[19] The plaintiff says that by operation of the settlement agreement in accordance with its terms the defendant must contribute an additional $14,155.89 to make up the sum of $100,000, the balance of the money payable to Mrs. B[redacted]. The defendant disagrees. His counsel says that it was not contemplated that any past payments by Mr. and Mrs. W[redacted] would be paid or taken into account in calculating the net proceeds available for distribution to Mrs. B[redacted]. Put another way, the defendant says that the parties made the settlement on the fundamental assumption that after payment of the debt to Mr. and Mrs. W[redacted], the sum of $100,000 (plus or minus $2,000) would be available to be paid to Mrs. B[redacted]. If the net proceeds available for distribution to Mrs. B[redacted] are substantially less, then the defendant says the agreement to pay Mrs. B[redacted] $100,000 was reached on a mistaken assumption.

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[20] The defendant asks the court to find that this is a common mistake or if not, a settlement agreement purportedly made by the defendant's counsel without authority.

[21] The question is: was the settlement agreement reached on the mistaken assumption that after the payment of the indebtedness to Mr. and Mrs. W[redacted] there would be approximately $100,000 available from that property for distribution to the plaintiff?

[22] On this application, I have reviewed affidavits from the plaintiff, her father and both counsel at trial. I have also reviewed a transcript of the proceedings when the terms of settlement were outlined. I note that Mr. and Mrs. W[redacted] take the position that the indebtedness to them to be satisfied from the sale of the 4[redacted] Avenue property includes the mortgage payout figure and the earlier payments that were made.

[23] Was there a mistake made by the parties at the time of the settlement? If so what is the nature of that mistake and what is the effect of the mistake, if any?

[24] Mr. B[redacted]s counsel deposed that Mrs. B[redacted] (in settlement discussions) wanted $100,000 from the [redacted] Avenue property. She said that based on her calculations of the mortgage payout figures that she had seen and counsel's estimates of commission and property taxes, she discussed with

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Mrs. B[redacted]'s counsel that the net sale proceeds would be between $1,000 and $2,000 short of $100,000. Mr. B[redacted]'s counsel, during the settlement discussions, did not review, at that time, the documents with respect to the so-called additional payments which were referred to in the plaintiff's document brief filed at trial. She deposed that the "mutual calculation of $100,000 net proceeds" considered only the money that would be required to pay out the current indebtedness under the mortgage on Mr. and Mrs. W[redacted]'s property. The defendant's counsel deposed that:

> I knew Mr. W[redacted] was claiming extra payments which we disputed. Our trial position was that those payments either did not arise from the written agreement between Mr. [redacted] and Mr. B[redacted], or if they did arise from the agreement, the payments were "family debts" and any extra amount to Mr. W[redacted] would reduce the amount Mr. B[redacted] would pay Mrs. B[redacted].

[25] She added however "we did not discuss these positions during settlement discussions, we only discussed how the $266,000 aggregate would be divided between the parties."

[26] Following the sale of the [redacted] Avenue property it became apparent that there was a problem and the defendant's counsel wrote and said:

> You and your client are well aware that the dollar figures arrived at were based on the net equity being received out of the [redacted] Avenue property of $100,000 plus or minus $1,000 or $2,000.

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[27] Counsel for the plaintiff deposed that:

> I indicated to her (Mr. B[redacted]'s counsel) that the $100,000 figure together with retention of her RRSPs and chattels was the lowest figure the plaintiff would settle for. I, at no time, warranted to (the defendant's counsel) that I believed that the sale of the matrimonial (home) would net $100,000 although I agree it was my belief that the figure would be closer to $100,000 than the actual figure of $86,000 which was leftover.

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[28] The plaintiff's counsel deposed that during the settlement discussions there was no dispute raised as to the W[redacted]' entitlement to claim the monies they had paid on the mortgage. The plaintiff's counsel also deposed there was no suggestion during settlement discussions that Mr. W[redacted] would take any discount on the amount owing to him.

[29] In the plaintiff's counsel's affidavit, he indicates that the defendant, Mr. B[redacted], attested under oath that he owed $120,000 to Mr. W[redacted]. The plaintiff's counsel also points to the defendant's property and financial statement of May 6, 1996, and his examination for discovery transcript of July 18, 1997, which indicates a loan from the W[redacted] of $120,000. This is in support of a contention that the defendant was not or ought not to have been mistaken about the anticipated net proceeds from the [redacted] Avenue property sale.

[30] From my review of the evidence I conclude that the defendant's counsel, as well as the plaintiff's counsel, at the

time of the settlement anticipated about $100,000 remaining for distribution from the sale of the [redacted] Avenue property, after payment of the indebtedness to the [redacted].

[31] The plaintiff's counsel indicated orally in his opening comments at trial, in effect, that: the matrimonial home on [redacted] Avenue was subject to an agreement for sale that was approved by the court in February; that the agreement completed at the end of the month; and, for round figures, that there would be approximately $100,000 in equity that would flow from that house after the payment of the mortgage on it. The plaintiff's counsel also indicated in his opening that there was a loan owing by the parties (or by Mr. B[redacted]) to the plaintiff's father because he assisted in the purchase of this home and placed a $120,000 mortgage on his own home which was then serviced by Mr. B[redacted] for a period of time; and that the mortgage had to be paid out because Mr. and Mrs. W[redacted] were on title on the matrimonial home. During his opening, I asked the plaintiff's counsel the amount of the loan. The plaintiff's counsel indicated to this effect: "$120,000 but, nonetheless, at the end of the day, the sale of the property is for $430,000 and within spitting distance of the figure of $100,000. That's what will flow through at the end of the day after payment of the existing mortgage, the mortgage to Mr. W[redacted], the taxes on the property...."

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[32] When the terms of settlement were spoken to in court, the plaintiff's counsel said "if there is a shortfall then Mrs. B[redacted] will receive the additional monies from Mr. B[redacted]. **It's going to be close, one way or the other.** If there is a surplus, he will receive the surplus." (my emphasis)

[33] When the settlement terms concerning the payment to Mr. and Mrs. W[redacted] were described, the plaintiff's counsel said:

> I should also add another term, My Lord, which my friend and I have spoken and I think follows from the fact that Mr. W[redacted] (phonetic) and his wife is on title, that Mr. W[redacted] -- there is a contract and I think rough calculations -- when I say rough, I think they are precise with the exception of a small amount of legal expense that he has incurred but he has a contractual arrangement that is found in the exhibit book for repayment of the mortgage that he has on his own house. So, from the sale of the [redacted] Avenue property, Mr. B[redacted] will honour the obligations to Mr. W[redacted], such that the sum owing to him will be extinguished in that sale.
>
> The Court: That's contemplated, I take it.
>
> Counsel for the Defendant: Yes, that is My Lord.

[34] A book of documents was filed as Exhibit 1 at trial. Page 2, tab 11, contained a calculation of the interest payments paid by the W[redacted]s to Surrey Metro from July 30, 1996 through, presumably, October 1997 (although it reads October 1996) and the payment to Laurentian Bank of $2,693. The document indicated that the mortgage on the W[redacted]' home as at October 6, 1997, was $109,450.74 and that to October 6, 1997, the W[redacted] had paid out $12,035.04 for a total of $121,485.78.

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[35] From a review of all of the evidence, I conclude that the parties were mistaken about the amount remaining after discharging the debt to Mr. and Mrs. W[redacted]. Both counsel operated under the assumption and made the settlement on the basis that the amount would be $100,000. In fact, if the W[redacted], as they have, claim all monies owing to them, the balance available would be about $86,000. That is an amount that is not, as counsel described it, "within spitting distance" of $100,000.

[36] If the amount to satisfy the indebtedness to Mr. and Mrs. W[redacted] is in fact about $123,000 (which is the position they have taken and appear entitled to take) then the parties were mistaken about the approximate amount available for distribution to Mrs. B[redacted] from the sale of the [redacted] Avenue property.

[37] That mistake was common in that each party's counsel apparently was under the same mistaken belief, that is that after the indebtedness to the W[redacted] was satisfied there would be about $100,000 available for distribution to Mrs. B[redacted].

[38] It is argued that Mr. B[redacted] was aware of the true amount of the indebtedness and hence not mistaken or that the mistake was only unilateral. I cannot accept either of those arguments. Mr. B[redacted]'s reference to a debt of $120,000 in his

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affidavit and on discovery, were simply references to the original principal amount.

[39] I think that the evidence indicates that both parties were operating under the same mistaken assumption. This mistaken assumption was as to a fundamental condition of the agreement.

[40] What is the effect of this mistake? Where both parties to a contract share a common mistake, the contract may be voidable in equity. The test for determining whether the mistake warrants an equitable remedy is set out in ***Solle* v. *Butcher***, [1950] 1 K.B. 671, [1949] 2 All. E.R. 1107 (C.A.):

> A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts, or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.

[41] The remedy available for a mistake in equity is rescission.

[42] Is rescission appropriate in these circumstances? I understand that the settlement has been partly performed. Some monies have been paid to Mr. B[redacted] and some monies paid out to Mrs. B[redacted]. The latter payments were made when the parties were aware of Mr. B[redacted]'s application for rescission on the ground of mistake. But if rescission is the appropriate

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remedy, it cannot simply be granted in part, i.e. as to the obligation to pay Mrs. B[redacted] $100,000. The parties must be able to be put back in the position they were in at the time of the agreement.

[43] What is the appropriate remedy in equity, having found that there is a common mistake? Is rescission possible? If the plaintiff takes the position that rescission is impossible, she must file any affidavit material and written argument in support of that position within 30 days. In those circumstances, the defendant shall have 30 days thereafter to file any written and affidavit material. Alternatively, of course, the plaintiff is entitled to complete the settlement on the basis that her parents have their indebtedness satisfied in full and she receives the sum of $85,844.11 from the sale of the 4th Avenue property.

[44] Although I have found the settlement agreement voidable in equity by reason of a common mistake, the disposition of this application must await any further submission the plaintiff may make.

[45] Either party is at liberty to apply for directions with respect to these reasons for judgment.

"J.S. Sigurdson, J."

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