Date: 20221114
Docket: CI 17-01-10389
(Winnipeg Centre)
Indexed as: Sherbeth et al. v. Sherbeth et al.
Cited as: 2022 MBKB 213

# COURT OF KING'S BENCH OF MANITOBA

**B E T W E E N:**

| | | |
|---|---|---|
| KENNETH SHERBETH and JENNIFER SHERBETH, plaintiffs, | ) | Appearances: |
| | ) | BRADLEY T. McCLELLAND for the plaintiffs |
| - and - | ) | |
| GARY SHERBETH, BERNARD SHERBETH and CRAIG MACKENZIE CAINE, defendants. | ) | FARON J. TRIPPIER<br>IRINA VAKUROVA<br>for the defendant, Gary Sherbeth |
| | ) | JUDGMENT DELIVERED: November 14, 2022 |

## GRAMMOND J.

## INTRODUCTION

[1] The plaintiffs seek, by way of summary judgment, specific performance, or in the alternative, damages in the principal amount of $95,905.00 against the defendant Gary Sherbeth, pursuant to a settlement agreement that they allege was reached at a judicially assisted dispute resolution conference ("JADR Conference"). The plaintiffs do not seek judgment against the remaining defendants.

## BACKGROUND

[2] The parties in this matter, who are family members of one another, have been involved in many legal proceedings in this and other courts over a period of many years. It is not necessary to recite the details of all of those disputes, but the events relevant to this motion are as follows:

(a) **2014**: the plaintiff Kenneth Sherbeth sued his father the defendant Bernard Sherbeth in CI 14-01-88461 (the "2014 Claim"), claiming an interest in a piece of land held jointly by Bernard and Gary (the "Land");

(b) **September 14, 2016**: the JADR Conference took place, which the plaintiffs allege resulted in a settlement of all disputes among the parties, including the 2014 Claim; and

(c) **September 15, 2016**: Mr. Antoine Hacault of Thompson Dorfman Sweatman LLP ("TDS"), who represented one or more of the defendants at the JADR Conference, sent an e-mail to counsel for the plaintiffs (the "E-mail"), which the plaintiffs argued confirms the settlement agreement.

## ORDER TO CONTINUE

[3] Gary raised as a preliminary matter on this motion the absence of an order to continue in this proceeding, arising from the death of Bernard on January 6, 2019.

[4] *Court of King's Bench Rule* 11.01 provides as follows:

> 11.01 Where at any stage of a proceeding the interest or liability of a party is transferred or transmitted to another person by … death … no further steps in the proceeding shall be taken until an order to continue the proceeding … against the other person has been obtained.

[5] It is trite law that when interpreting legislation, the words used are to be read in their entire context, and harmoniously with the scheme, object and intention of the legislation (***Rizzo & Rizzo Shoes Ltd. (Re)***, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27). Certainly, on the face of Rule 11.01, an order to continue should have been taken after Bernard's passing.

[6] Having said that, pursuant to Rule 1.04, the court rules are to be construed liberally, to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits, in a manner that is proportionate to the nature of the proceeding, the amount at issue, the complexity of the issues, and the likely expense to the parties. In addition, pursuant to Rule 2.03, the court can dispense with compliance with any court rule, in the interests of justice.

[7] The evidence reflects that although Karan Lajoie, the sister of Kenneth and Gary and the daughter of Bernard, is the named executor of Bernard's estate, no Grant of Probate has been obtained. Having said that, Bernard's estate has no interest in the outcome of this motion, because the plaintiffs do not seek judgment or any other relief as against him or his estate.

[8] As such, in my view, the parties' failure to comply with Rule 11 is of no moment, and to require the issuance of an order to continue would not be proportionate, expeditious, or in the interests of justice. Accordingly, the absence of such an order in this case is not a bar to proceeding with the plaintiffs' motion.

## MOTION TO STRIKE

[9] Gary filed an affidavit sworn by Karan in his defence of this motion, and the plaintiffs submitted that paragraphs 5 through 20 of that affidavit ought to be struck, on the basis that the contents are irrelevant, scandalous, frivolous and/or vexatious, and were filed to impugn Kenneth's character. The plaintiffs relied upon Rule 25.11 and ***The Rural Municipality of MacDonald v. Samborski et al.***, 2019 MBQB 113 (CanLII). Gary submitted that the impugned paragraphs were included for background information and context.

[10] In fact, the impugned paragraphs include allegations of aggressive, intimidating, harassing, and violent behaviour by Kenneth in 2015 and 2016, well prior to the JADR Conference. None of that evidence has any relevance whatsoever to the validity of the alleged settlement agreement, and it is prejudicial in nature. As such, paragraphs 5 to 20 of Karan's affidavit sworn July 20, 2022 are struck out.

## SUMMARY JUDGMENT AND RULE 49.09

[11] The plaintiffs requested summary judgment in this matter pursuant to Rule 20, the material portions of which provide:

> **Summary judgment motion**
>
> 20.01(1) A party may bring a motion, with supporting affidavit material or other evidence, for summary judgment on all or some of the issues raised in the pleadings in the action.
>
> …
>
> **Responding evidence**
>
> 20.02 In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit

material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

**Granting summary judgment**

20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

**Powers of judge**

20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:

(a) weighing the evidence;

(b) evaluating the credibility of a deponent;

(c) drawing any reasonable inference from the evidence;

unless it is in the interests of justice for these powers to be exercised only at trial.

[12] The leading case on summary judgment is ***Hryniak v. Mauldin***, 2014 SCC 7 (CanLII), where the court stated:

[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[13] In ***Dakota Ojibway Child and Family Services et al v. MBH***, 2019 MBCA 91 (CanLII), the court stated:

[108] At the hearing of [a summary judgment] motion, the moving party must first satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute, and that proceeding to trial would generally not be proportionate, timely or cost-effective). In so doing, the moving party bears the evidential burden of establishing that there is no genuine issue requiring a trial.

> [109] If those requirements are met, the responding party must meet its evidential burden of establishing "that the record, the facts, or the law preclude a fair disposition" (*Weir-Jones* at para 32; and *Stankovic v 1536679 Alberta Ltd*, 2019 ABCA 187 at para 22; see also *Stankovic* at para 29) or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding party must establish why a trial is required (see *Hryniak* at para 56). If the responding party fails to do so, summary judgment will be granted.
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> [110] The analysis contemplated by Karakatsanis J in *Hryniak* is itself a two-step analysis (see para 66). First, the motion judge must determine if there is a genuine issue requiring a trial based only on the evidence, without using any additional fact-finding powers. If there is such an issue, the second step requires the motion judge to determine if the need for a trial can be avoided by weighing the evidence, evaluating credibility, drawing inferences and/or calling oral evidence (see r 20.07(2)).
>
> [111] There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial.

[14] Although the plaintiffs' notice of motion contains no specific reference to Rule 49.09, they sought to rely upon that provision in their written brief and in oral argument. Rule 49.09 applies to situations where a party to an accepted settlement offer fails to comply with the settlement and the party opposite files a motion for judgment. The plaintiffs advised that they elected to file a new claim to enforce the settlement, rather than a Rule 49.09 motion in the 2014 Claim, because the settlement agreement involved multiple court proceedings, a variety of parties, and some issues that were not before the court in any proceeding. Gary took no position on whether the motion should proceed under Rule 20 or 49.09.

[15] The case law reflects that somewhat different tests apply on a Rule 49.09 motion and a summary judgment motion. In ***Malley v. Red River Valley Mutual Insurance Company***, 2010 MBQB 111 (CanLII), the court stated:

> [4] In this instance the Defendant has opted to proceed under Rule 49.09 (a) to enforce the settlement agreement. The Defendant brings a motion for summary judgment. The procedure for summary judgment provides for the moving party to adduce evidence of a prima facie right to judgment and then the onus shifts to the responding party to bring evidence showing a genuine issue for trial. In my opinion, a motion such as this is not equivalent to a motion for summary judgment. The court in these circumstances is not to assess the merits of the cause of action before the court. Rather, the court is to determine if there was a settlement agreement arrived at and if so, whether it should be enforced.

[16] Similarly, in ***Sparco Holdings Inc. et al. v. Willdamerle Holdings Ltd. et al.***, 2010 MBQB 203 (CanLII), the court stated:

> [25] On a motion such as this, dissatisfaction with the terms of a settlement agreement or unhappiness with counsel, will not affect the enforceability of a settlement agreement otherwise found to be in existence. See *Aleph-Bet Child Life Enrichment Program Inc., supra*, at para. 12. Accordingly, where a settlement agreement is found to be in existence, a court need not and in most cases should not engage in an examination of the terms of the settlement agreement respecting their fairness or otherwise. Neither should a court permit or participate in an inquiry into the conduct of counsel except where an examination of counsel's conduct would be probative respecting the more specific and relevant allegation suggesting that counsel (<u>with the knowledge of opposing counsel</u>) acted without binding authority. Where complaints exist either in respect of the fairness of the terms of the agreement or in respect of the more general conduct of counsel, any such related challenge and eventual relief will require another forum.
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> [26] Given the circumscribed focus of the court on a motion under Rule 49.09(a), a court should also be careful to not slide into an unconscious or indirect assessment of the merits of the original cause of action. To repeat, on a motion of this sort, the court must simply determine if there was a settlement agreement arrived at and if so, whether it should be enforced. See *Malley v. Red River Valley Mutual Insurance Co.*, 2010 MBQB 111, at para. 4. Where a settlement agreement is found, enforcement will usually follow absent a party's lawyer acting outside of his or her authority <u>with the knowledge of opposing counsel</u>.
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> [emphasis in original]

## **ISSUES**

[17] Whether I consider this motion pursuant to Rule 20 or Rule 49.09, the main issue before me is whether I am satisfied on a balance of probabilities, on the strength of the evidence before me, that an agreement was reached at the JADR Conference.

## **ANALYSIS**

[18] I will consider first two preliminary issues.

[19] The first preliminary issue is the scope of the JADR Conference. I am satisfied that it was intended as a mechanism by which all of the issues between all of the various parties would be addressed, with a view to a global settlement. This approach is apparent on the face of the Mediation Briefs prepared by both the plaintiffs' counsel and TDS, and is consistent with the affidavit evidence of both Kenneth and Gary.

[20] The second preliminary issue is whether TDS acted for both Gary and Bernard at the JADR Conference. Gary filed the statement of defence in this matter as a self-represented litigant, wherein he admitted that TDS acted as his counsel. I note also that although Gary was not a party to the 2014 Claim, the JADR Brief filed by TDS included a section entitled "Issues and Legal Position of Bernard and Gary Sherbeth" and a settlement proposal that "Bernard and Gary" submitted was reasonable. I am satisfied, therefore, that TDS acted for both Gary and Bernard at the JADR Conference. My conclusion is unchanged by the fact that when TDS sued to recover its fees, it named only Bernard as a defendant.

[21] With respect to whether a settlement agreement was reached at the JADR Conference, Kenneth deposed that a comprehensive settlement was reached, including

a $70,000.00 payment to the plaintiffs and the opportunity to retrieve their personal property from the Land. Those are the settlement terms that the plaintiffs now seek to enforce.

[22] Conversely, both Gary and Karan, who also attended the JADR Conference, deposed that no settlement was reached, and I note that neither of them were cross-examined by the plaintiffs. Gary stated, among other things, that: "[a]t the mediation, the parties in attendance formulated a proposal … [which] was to be discussed with the parties who were not present. … On or about September 16, 2016, I informed Antoine Hacault that the Proposal was rejected".

[23] None of the parties advanced any evidence from Mr. Hacault, but I have considered the E-mail carefully. The material contents of the E-mail are as follows:

a) "Further to the settlement yesterday I believe the following documents need to be prepared and matters attended to: …". Mr. Hacault then inserted 12 enumerated paragraphs that related to, among other things: the exchange of mutual releases, a series of consent orders, the delivery of $70,000.00 by TDS to the plaintiffs' counsel, and specific acts to be carried out by various parties;

b) "We believe this covers the essential points of the settlement yesterday. We await your views on any of them. Perhaps a call would be the best way to refine or finalize the terms of settlement"; and

c) "Thank you again for your efforts and co-operation in the JADR leading to what we hope will be a solution to this longstanding dispute".

[24] Gary argued that Mr. Hacault's stated "hope" for a solution is indicative that no settlement agreement was reached, but within the context of the E-mail as a whole, I reject this submission. It is much more likely that the expressed "hope" related to the end of a longstanding and complicated dispute among family members.

[25] Moreover, there is no mention of a proposal in the E-mail. Although Gary deposed that the day after the E-mail was sent, he informed Mr. Hacault that the Proposal was rejected, having considered the E-mail as a whole, and all of the language that Mr. Hacault used, it is clear that when he wrote the E-mail he believed a settlement agreement had been reached at the JADR Conference. The E-mail as written is completely inconsistent with the notion that at the end of the JADR Conference there was an outstanding proposal open for acceptance. I will add that if there was a miscommunication between Gary and Mr. Hacault on this point, the plaintiffs are not responsible for it and should not bear the consequences of it, because there is no evidence that the plaintiffs or their counsel knew of any issues between Mr. Hacault and Gary or Bernard.

[26] For all of the foregoing reasons, I am satisfied that a settlement agreement was reached, pursuant to which the plaintiffs were to receive $70,000.00, and that no trial is required to determine that issue.

[27] The next question to consider, then, is who agreed to pay $70,000.00 to the plaintiffs.

[28] The E-mail reflects that TDS would deliver $70,000.00 to the plaintiffs' counsel, but it is silent as to who would fund the payment. Gary deposed that he did not agree

to make any payment to the plaintiffs, and Karan deposed that Bernard did not agree to make any payment to the plaintiffs.

[29] Kenneth deposed that Gary, Bernard and Craig Mackenzie Caine ("Mackenzie") would collectively pay $70,000.00 to the plaintiffs and that "…it was always understood that it was to be Gary and Bernard who would pay the funds as they legally owned the Property". Although these statements seem inconsistent relative to whether Mackenzie would contribute to the payment, Kenneth also deposed that the $70,000.00 was to be paid in exchange for his agreement to withdraw his claim to the Land which, at the time of the JADR Conference, was owned jointly by Gary and Bernard. In addition, it is clear that Mackenzie was not present at the JADR Conference and that his only involvement in the disputes among the parties related to a protection order that has lapsed. Accordingly, the plaintiffs are not pursuing judgment against him, and I accept that he was not expected to contribute to the settlement amount.

[30] On cross-examination, when asked about whether Gary and Bernard would contribute equally, or whether either of them was solely responsible for payment, Kenneth testified "[i]t is Gary and my dad Bernard, and the monies would have came from the estate, or I would have got the land back, one of – I agreed to give up the dispute for the land, for the $70,000, plus my [personal] property" [Transcript of the Cross-Examination on Affidavit of Kenneth, page 29, line 25 and page 30, lines 1 - 3].

[31] I accept that the main issue in the 2014 Claim related to ownership of the Land. Kenneth deposed that many years ago he, Bernard, and his mother Sophie made an agreement that he was to obtain title to the Land. Instead, some time after 2013,

Bernard made Gary a joint tenant on title to the Land, after which Kenneth filed the 2014 Claim. After Bernard's passing in 2019, title to the Land passed to Gary, so as Kenneth has deposed, Gary "…received the benefit of the Property for which the $70,000.00 was to be paid".

[32] The plaintiffs argued that Gary and Bernard were jointly liable to make the $70,000.00 payment, described in the claim as "collective" liability. Gary argued that the plaintiffs are in fact pursuing an allegation of joint and several liability, despite the fact that Bernard's estate is not a party to this motion.

[33] In ***Royal Bank of Canada v. King***, 1982 CanLII 1177 (ABKB), 21 Alta. L.R. (2d) 336, quoting Halsbury's, the court provided helpful definitions of "joint" and "several" liability, as follows:

> [18] … (1) *Joint promises.* Joint liability arises where two or more persons jointly promise to do the same thing; for instance, B and C jointly promise to pay £100 to A. In the case of a joint promise, there is only one obligation, namely that each of B and C is liable for the performance of the whole promise but payment of £100 by one discharges the other. Joint liability is subject to a number of strict and technical rules of law which are discussed below.
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> (2) *Several promises.* Several liability arises where two or more persons make separate promises to another; for instance B and C each promise to pay £100 to A. In this case, the several promises by B and C are cumulative, thus A may recover £200, and payment of £100 by one of them does not discharge the other. There are therefore two separate contracts, one between A and B, and the other between A and C, and there is no privity between B and C.
>
> (3) *Joint and several promises.* Joint and several liability arises where two or more persons join in making a promise to the same person, and at the same time each of them individually makes the same promise to that same promisee; for instance B and C jointly promise to pay £100 to A, but both B and C also separately promise A that £100 will be paid to him by either B or C. Joint and several liability is similar to joint liability in that the co-promisors are not cumulatively liable, so that payment of £100 by B to A discharges C; but it is free of most of the technical rules governing joint liability.

[34] I am satisfied, on the strength of Kenneth's evidence and the E-mail, that someone represented by TDS and present at the JADR Conference agreed to pay to the plaintiffs the sum of $70,000.00 as part of the settlement, and that the payment related to the Land and the 2014 Claim. The only two individuals who could have done so were Gary and Bernard, both of whom owned the Land at the material time and were represented by TDS at the JADR Conference.

[35] The reality is that in many settlement contexts, plaintiffs are not told which defendants are funding the settlement proceeds, and in what amount. In this case, it is possible that either Gary or Bernard agreed to fund all or a specific part of the $70,000.00, such that they agreed to several liability as between them without telling the plaintiffs. If that were the case, however, Gary could have and should have advanced that evidence on this motion. The respondent in a summary judgment motion is required to put their best foot forward, and it is of note that Gary did not file any evidence from Mr. Hacault relative to his understanding of the outcome of the JADR Conference or the contents of the E-mail. It is not enough for both Gary and Karan (on behalf of Bernard) to simply deny that either Gary or Bernard agreed to make any payment, particularly in the face of the E-mail. In the absence of any reasonable explanation from Gary, therefore, I have inferred that he and Bernard agreed to fund the payment together, pursuant to either a joint liability or joint and several liability arrangement. In either scenario, the plaintiffs are entitled to claim the full amount from Gary, and he can decide whether he wishes to claim any contribution from Bernard's estate.

[36] Gary also argued that many of the settlement terms other than those which the plaintiffs seek to enforce have not been completed. For example, no releases have been exchanged, the pending litigation order filed by Kenneth on title to the Land has not been discharged, and the 2014 Claim has not been discontinued. In my view, any non-compliance with the settlement terms is understandable given that Gary denounced the settlement agreement shortly after the JADR Conference. Having said that, some of the settlement terms were completed, (including the erection of a fence by Kenneth, and the construction of an access road by Gary), while other settlement terms have been rendered moot due to the passage of time (such as the expiration of various protection orders). Moreover, the settlement terms sought to be enforced by the plaintiffs can be severed from the rest of the agreement (***Bank of Montreal v. Skyview Trailer Sales Inc.***, 2003 Carswell Ont. 5457 (WL)).

[37] In conclusion, the settlement agreement should be enforced, relative to the $70,000.00 payment, and I am not satisfied that a trial is required on that issue.

[38] I will now consider the plaintiffs' claim for $25,905.00, representing Kenneth's estimate of the value of the personal property that the plaintiffs were to retrieve from the Land pursuant to the settlement, but were ultimately unable to retrieve.

[39] I note that in the mediation brief filed by TDS, Gary and Bernard proposed as a potential settlement term the removal by Kenneth of his personal property from the Land. I accept, on that basis, together with Kenneth's evidence and the E-mail, that pursuant to the settlement agreement the plaintiffs were to retrieve any personal property from the Land.

[40] I reject Karan's evidence that most of the plaintiffs' personal property was picked up in June 2015. If that were true, there would have been no need for TDS to propose a settlement term on that issue in its brief or to include it as a settlement term in the E-mail. Gary provided no evidence on this point and did not challenge either the inventory of items or the valuations advanced by Kenneth. Accordingly, I accept Kenneth's evidence that the plaintiffs did not retrieve their personal property, and that by now it has been disposed of, destroyed, or dissipated.

[41] A settlement agreement relative to the retrieval of the plaintiffs' personal property was reached and should be enforced. A trial is not required on this issue, and Gary is liable to compensate the plaintiffs for the personal property as claimed.

## CONCLUSION

[42] I am satisfied that a settlement agreement was reached, that it should be enforced, and that there is no genuine issue requiring a trial in this matter.

[43] The plaintiffs' motion is granted, and they shall have judgment against Gary in the amount of $95,905.00 plus interest. Upon satisfaction of the judgment, the plaintiffs will discharge the pending litigation order filed against the Land.

[44] If costs cannot be agreed upon, counsel may seek an appearance to make submissions.

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J.