NOVA SCOTIA COURT OF APPEAL
Citation: ***Kedmi v. Korem***, 2012 NSCA 124

Date: 20121214
Docket: CA 381259
Registry: Halifax

Between:

Iris Kedmi

Appellant

v.

Nahman Korem

Respondent

Judges:	Hamilton, Beveridge and Bryson, JJ.A.
Appeal Heard:	December 3, 2012, in Halifax, Nova Scotia
Held:	The appeal is dismissed with costs payable to the respondent in the amount of $1,500, per reasons for judgment of Bryson, J.A.; Hamilton and Beveridge, JJ.A. concurring.
Counsel:	Appellant, in person Candee McCarthy and Jennifer Anderson, for the respondent

Reasons for judgment:

[1] Iris Kedmi appeals the July 6, 2012 order issued by the Honourable Justice M. Claire MacLellan of the Supreme Court of Nova Scotia (Family Division) which followed a settlement conference with the parties. The trial was to commence January 23, 2012. Instead, counsel for Ms. Kedmi sought a settlement conference which resulted in negotiations on January 23, 24 and 25, 2012. Counsel acknowledged on the record that their clients' debts exceeded assets and neither spouse had an income.

[2] At the conclusion of negotiations, Ms. Kedmi's lawyer addressed the court to advise that a final resolution had been reached on all issues. It was anticipated that the order would then be drawn up by counsel.

[3] Soon thereafter, Ms. Kedmi discharged her counsel and began acting for herself. Ms. Kedmi and Mr. Korem's counsel were not able to agree on the form of a consent order. The parties submitted competing orders to Justice MacLellan. Ms. Kedmi filed a motion to settle the form of order. The judge then advised the parties that she would prepare an order based on the record. She drafted, signed and had the prothonotary issue a corollary relief order. As this occurred prior to Ms. Kedmi's scheduled motion date, Ms. Kedmi's motion was withdrawn.

[4] Ms. Kedmi, acting for herself, now appeals arguing:

1. Incompetency of her counsel;

2. Error by Justice MacLellan in drafting an order that was not agreed between the parties.

3. Vagueness in the order which prevents it from being enforced;

Ms. Kedmi requests that the order be set aside and the matter returned for trial.

Preliminary objection:

[5] Mr. Korem objects that an appeal from a "consent order" may not be available or, alternatively, requires leave of the Court which has not been granted, citing s. 39 of the *Judicature Act*, R.S.N.S. 1989, c. 240:

> 39 No order of the Supreme Court made with the consent of the parties is subject to appeal, and no order of the Supreme Court as to costs only that by law are left to the discretion of the Supreme Court is subject to appeal on the ground that the discretion was wrongly exercised or that it was exercised under a misapprehension as to the facts or the law or on any other ground, ***except by leave of the Court of Appeal***. [Emphasis added]

[6] Mr. Korem argues that the emphasized words do not modify and apply to orders made by consent of the parties. They only modify the words beginning, "...and no order of the Supreme Court as to costs. ..." He cites jurisprudence that questions the Appeal Court's jurisdiction to entertain an appeal of a consent order (*Bank of Nova Scotia v. Golden Forest Holdings Ltd.* (1990), 98 N.S.R. (2d) 429 (N.S.C.A.); *Hennick v. Children's Aid Society of Cape Breton*, 2003 NSCA 84; *Irving v. Irving* (1997), 164 N.S.R. (2d) 330 (C.A.). Alternately, if leave could be granted, it should not because the trial court is the appropriate forum to attack a consent order: *Messom v. Levy* (1997), 159 N.S.R. (2d) 252 (C.A.).

[7] It is unnecessary to decide this interesting preliminary question because the appeal cannot succeed on the grounds raised by Ms. Kedmi.

Issue 1 - Incompetence of Counsel:

[8] Although incompetence of counsel is alleged by Ms. Kedmi, she does not say that she did not agree to the terms of settlement acknowledged by her lawyer in her presence in open court. But more fundamentally, the incompetency of counsel is not a ground of appeal in a civil matter. The incompetency of one party's counsel should not be the problem of the other party or the court. The client's remedy is to sue her lawyer. There is no civil equivalent to s. 686(1) of the *Criminal Code* which authorizes or allows a trial to be overturned on the basis of "miscarriage of justice". Ineffective assistance of counsel may sometimes constitute a miscarriage of justice in criminal cases. There is some law suggesting that such a ground of appeal may exist in the rarest of civil cases where a very

compelling public interest is engaged, ie., involving vulnerable persons like children and others who may be under a mental disability (see, for example, *D.W. v. White* (2004), 189 O.A.C. 256, at para. 55 and *Osborne v. Gilbert*, 2007 ONCA 202). It is not necessary to decide whether to follow this jurisprudence. There is no compelling public interest in this case. This ground of appeal fails.

Issue 2 - Order not agreed to by the parties:

[9] The *Civil Procedure Rules* provide for the drafting and issuance of orders, both after a hearing and following a settlement conference (78.04(3) and (4). Where parties cannot agree on an order following a settlement conference, they may apply to the court for an order implementing the agreement (Rule 10.04). That is effectively what happened here. Rule 10.04(3) and (4) recognize the privileged position of a settlement conference judge when resolving the terms of an order:

> **10.04 (3)** A motion under this Rule 10.04 in which it is alleged that an agreement was made in the presence of a settlement conference judge must be heard by the settlement conference judge, unless the judge directs otherwise.
>
> **(4)** The settlement conference judge may take into account the judge's own knowledge of what took place at the conference, as well as the evidence presented by the parties.

This Rule is incorporated by reference into proceedings in the family division (Rule 59.02(1)). Rule 59.39 applies to settlement conferences in the family division. That Rule excludes part of Rule 10 but not Rule 10.04. This Court will show deference to a settlement judge's order where, as here, he or she was privy to the terms of settlement: *Majaess v. Majaess*, 2004 NSCA 9, at para. 21.

[10] In this case, Justice MacLellan asked the parties whether they agreed with the terms of settlement read into the record and they both answered positively. The Court's exchange with the parties discloses:

> **THE COURT:** Okay. Mr. Korem you heard everything your lawyer said Monday, today, yesterday?

MR. KOREM: Yeah.

THE COURT: Particularly the last half-hour and as it relates to Danielle on Monday, you're in agreement with all those terms and conditions?

MR. KOREM: Yes, I am.

THE COURT: Ms. Kedmi, you've heard the discussions that we've had and the terms we put in relation to custody Monday and today, and what we put on the record today for property. You're in agreement with those terms and conditions?

MS. KEDMI: Yes (thank you?).

[11] As for allegations that her lawyer "pressured her" into settling, Mr. Korem is entitled to rely on the authority of Ms. Kedmi's counsel (*Garnier v. Caldwell*, [1998] N.S.J. No. 453 (C.A.), para. 3), and to Ms. Kedmi's own acceptance of settlement in the face of Justice MacLellan's questions.

2. Errors in the order:

[12] Ms. Kedmi alleges three errors in the order which she says do not embody the agreement of the parties:

(a) The judge added the words "the upkeep of the property" to the agreement respecting Ms. Kedmi's exclusive occupation of the matrimonial home and her responsibility to maintain it;

(b) The judge fixed the date for determination of matrimonial debt at August 17, 2012. Ms. Kedmi says this date was not agreed between the parties;

(c) The judge erred by deciding to forgive child support arrears without hearing any evidence, and wrongly assuming it had been negotiated between the parties.

(a) Upkeep of the property

[13] The record shows that the actual turn of phrase used by the judge in the courtroom to describe Ms. Kedmi's obligation to care for the property was "day-to-day maintenance". Whether this is different from "upkeep" does not matter. This is precisely the kind of thing that could have been resolved between the parties by way of reference to the judge under *Civil Procedure Rule* 78.08 or otherwise by way of motion.

[14] It is clear from the record that Ms. Kedmi was intended to have maintenance obligations similar to that of a tenant. As much was conceded by Mr. Korem's counsel during oral submissions when she admitted that the cost of repairing the house's geothermal system was for her client. Insertion of the word "upkeep" in the corollary relief order did not contradict the agreement reached or invalidate the order issued.

(b) Date for settling debts

[15] The *Matrimonial Property Act*, R.S.N.S. 1989, c. 13, defines matrimonial assets as those acquired by spouses before or during their marriage. The date of valuation is the date of separation. Ms. Kedmi argues that Justice MacLellan erred when she fixed the "as of" date for assumption of debt by Mr. Korem. The impugned passage in the order reads:

> ...Nahman Korem shall be solely responsible for the repayment of all matrimonial debts, including the Line of Credit registered against the matrimonial home, any debt in his own name or in his joint name with Iris Kedmi, the creditors of Crown Jewel Resort, I.N.K. Real Estate and Crown Jewel Aviation existing at the date of separation, being August 17, 2010...

Ms. Kedmi says she did not agree to the date of August 17, 2010. She thought she was free of all debt as of the settlement conference date. But when questioned by the Court, the only example of post separation debt that she mentioned was the bill for geothermal work on the home – something that Mr. Korem's counsel acknowledged was for his account.

[16] Mr. Korem points out that the property issues were to be resolved by reference to Mr. Korem's statement of property which recorded the date of

separation – August 17, 2010. Ms. Kedmi agrees that is when the parties separated but she claims that it did not apply to debts. The record does not support her:

> **THE COURT:** ...Tab 8, the unsigned statement of property of Mr. Korem ***is the basis of the agreement as far as holdings and debts*** and although it's not signed he's attesting to the truthfulness of the document. Is that correct?
>
> **MS. MCCARTHY:** Yes, My Lady.
>
> **THE COURT:** Okay. Because it was brought up in subsequent discussion that Ms. Kedmi is making these determinations with reluctance because she still maintains that there are assets that have not been disclosed.
>
> **MS. MCCARTHY:** Well, My Lady, with the one exception that was clarified through the court that there is that . . . there is a bank account in Israel that is not reflected on that document.
>
> **THE COURT:** But has been . . .
>
> **MS. MCCARTHY:** That has . . . has . . .
>
> **THE COURT:** . . . disclosed.
>
> **MS. MCCARTHY**: Right, that has been disclosed and used as a conduit.
>
> **THE COURT:** Yes. I would put that right in the recitals . . .
>
> **MS. MCCARTHY:** Okay.
>
> [Emphasis added]

[17] This makes sense. Restricting one party to assets as of the date of separation, but giving another a blank cheque for debts incurred thereafter is not reasonable and the record supports Mr. Korem's submissions on this point. As the judge suggested, this agreement finds expression in the preamble to the order:

> The Statement of Property of Mr. Korem filed with the court, with the addition of the disclosed Israeli bank account, is the basis of the property division agreed to herein;

(c) Retroactive child support forgiven

[18] Ms. Kedmi says that there was no agreement – or that she did not understand there to be an agreement – that the settlement resolved all child support arrears.

[19] Mr. Korem's counsel explained that her notes entered as exhibit 7 summarized all payments made by Mr. Korem which related to or would offset spousal and interim child support. She says that where the record refers to "spousal support", it should mean "support" and that this was understood. The transcript of the exchange between counsel and the court – particularly at pp. 281, 291 and 293 – are consistent with the submissions of Mr. Korem's counsel. Moreover, this accords with the representation to the court by counsel for both parties that agreement had been reached on all issues.

[20] There is no basis to this ground of appeal.

Issue 3 - Is the order too vague?

[21] Finally, Ms. Kedmi says that the order issued is too vague and cannot be enforced.

[22] This ground of appeal evolves into a complaint that there were terms that should have been negotiated but were not owing to the incompetency of counsel. Ms. Kedmi makes such complaints as:

- There are differences of interpretation between her and her husband about the agreement;
- Although she has a "lifetime interest" in the matrimonial home, she does not know what would happen if Mr. Korem becomes bankrupt or sells the property;
- She is not sure what she is responsible for repairing;

- She is not sure what happens if the house is rented during her extended absence.

[23] None of these items render the agreement vague or unenforceable. It is important not to confuse lack of certainty with difficulty of interpretation. No agreement can provide for every possible eventuality nor can an agreement preclude differences of opinion about its meaning or enforcement. But these difficulties do not render agreements vague or unenforceable. They are all matters that parties can either negotiate or have resolved by resort to the court. It may be true that there are additional terms that Ms. Kedmi would like to have included in the settlement. But their absence does not vitiate an agreement that was intended to be binding.

[24] However, one of Ms. Kedmi's "examples" merits comment by this Court. Ms. Kedmi does not have a "lifetime interest" in the matrimonial home. She has exclusive possession. That is statutory relief available under s. 11(1) of the *Matrimonial Property Act*. In this case it is not an interest in land. It is clear that Mr. Korem would have title. The record shows that Ms. Kedmi was to give him a Quit Claim Deed.

Conclusion:

[25] The grounds of appeal are without merit. I would dismiss the appeal. I would award $1,500 in costs to Mr. Korem.

Bryson, J.A.

Concurred in:

Hamilton, J.A

Beveridge, J.A.