Bodnariuk v. *Gray*, 2003 NWTSC 8

Date: 2003 02 07
Docket: CV 08341

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DEBORAH ANN BODNARIUK

Plaintiff

- and -

ALFRED JUNIOR GRAY also know as
JOSEPH ALFRED NORMAN GRAY

Defendant

MEMORANDUM OF JUDGMENT

[1] This is an application pursuant to Rule 175 by the Defendant's Trustee in Bankruptcy for summary judgment dismissing the Plaintiff's claim.

[2] The factual background is as follows. The Plaintiff says that during the time she lived in a common law relationship with the Defendant, she co-signed a promissory note so that he could obtain a loan of approximately $40,000.00. The lender took guaranteed investment certificates owned by her as collateral. The Plaintiff alleges that she incurred this liability in return for the Defendant's promise that he would secure repayment of the loan with the proceeds of sale of his house in Yellowknife. This is also the house in which the parties resided. The Defendant used the loan proceeds to pay off some debts and then disappeared and defaulted on the loan. The lender realized on the security given by the Plaintiff. The Defendant apparently took no steps to carry out his promise to the Plaintiff.

[3] The Defendant declared bankruptcy in March 1999 and this action was commenced by the Plaintiff in June 1999. The Trustee sold the house in September

1999 and paid half the proceeds of sale into court, where it remains, pursuant to an agreement with the Plaintiff so as to clear the property's title of the certificate of *lis pendens* she had filed. The Defendant was discharged from bankruptcy in 2002.

[4] In her statement of claim, the Plaintiff claims entitlement to the Yellowknife property (as now represented by the proceeds in court) as family property pursuant to the *Family Law Act*, S.N.W.T. 1997, c. 18 or, alternatively, a declaration that the Yellowknife property is impressed with a resulting or constructive trust in her favour. Essentially, she wants the proceeds in court to indemnify her for the guaranteed investment certificates forfeited to the lender rather than be subject to division among the Defendant's creditors.

[5] Initially there was an issue because the length of cohabitation by the Plaintiff and the Defendant as pleaded in the statement of claim was less than two years and so not sufficient to bring her within the *Family Law Act*, S.N.W.T. 1997, c. 18. However, I allowed an application by the Plaintiff to amend the statement of claim as the commencement date of the relationship appeared to have been erroneously pleaded due to an error in her solicitors' office. Her affidavit evidence is that there was a common law relationship of two years' duration.

[6] The Trustee takes the position that because the relationship between the Plaintiff and the Defendant was one of creditor and debtor based on her co-signing the promissory note, the Plaintiff is merely an unsecured creditor as to his estate. The Trustee submits that summary judgment should be granted on three grounds: 1) that the Plaintiff has tendered insufficient evidence in response to the application for summary judgment; 2) that the law does not support the existence of a trust relationship on the facts before the court; and 3) that this action is stayed by reason of the Plaintiff's failure to obtain leave to pursue it.

[7] In submitting that the Plaintiff has tendered insufficient evidence, the Trustee relies on the obligation of a party responding to an application for summary judgment to put his or her best foot forward when it comes to the evidence. I referred to this obligation in *Arctic Environmental v. Northern Mgmt. & Komaromi et al*, 2000 NWTSC 53 at paragraph 23:

> A judge hearing an application for summary judgment is entitled to assume that the parties have put their best foot forward. It is not sufficient for the responding party to say that more and better evidence will or may be available at trial; the judge is entitled to assume that the parties would present no additional evidence at trial: *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Ont. Gen. Div.); *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25 (Ont. Gen. Div.) ...

[8] This does not mean that the responding party cannot present additional, or better, evidence at trial, but only that on the summary judgment application, the judge is entitled to assume that the evidence the party presents is all that is available and proceed to make a decision based on it.

[9] In this case, the only evidence is that of the Plaintiff, who says that the parties lived together for two years and that the arrangement between them with respect to her co-signing of the promissory note was as I have set out above. The length of time they resided together is obviously a fact within the knowledge of the Plaintiff and the credibility of her assertion has thus far been questioned only because the statement of claim originally pleaded a date which would not bring the length of cohabitation within the *Family Law Act*. The error as to the date has been explained by the affidavit evidence of her solicitor. As there was no cross-examination on the affidavits which might affect her credibility, I see no reason to reject her assertion on this point. There is no evidence contradicting what she says. Even if there was, that would almost certainly mean the issue would have to be tried.

[10] The real question on this application is whether the Plaintiff has raised a genuine issue for trial: Rule 176(2). Whether the Plaintiff can or will present further evidence of the length of cohabitation at trial and whether her credibility on that issue is brought into question at trial is not material at this point. This situation is quite different from the circumstances in the *Arctic Environmental* case, where the responding party made only broad denials and did not address specific facts put forward by the party applying for summary judgment. Here, the Plaintiff has put forward specific facts and there is no evidentiary basis at this point upon which to reject those facts.

[11] I take the same view of the evidence about the arrangement between the Plaintiff and the Defendant. Whether the Plaintiff has or can present any other evidence as to the arrangement they had is not the question on this application. She has put forward what she says was their arrangement and that is the only evidence before me. It is sufficient to raise the issue as to characterization of the legal position she is in as a result of that arrangement.

[12] That brings me to the Trustee's submission that the facts alleged by the Plaintiff do not in law amount to a trust. As indicated above, the Plaintiff claims a constructive trust in the Yellowknife property, as now represented by the proceeds held in court. The Plaintiff relies on s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended, which provides that the property of a bankrupt divisible among his creditors shall not comprise property held by him in trust for any other person.

[13] The Trustee's position is that the requirements for a constructive trust do not exist, in particular because there is a "juristic reason" for any enrichment of the Defendant, that being the creditor and debtor relationship between the parties. The Trustee thus says that the requirements of enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment are not met: see *C.I.B.C. v. Melnitzer* (1993), 23 C.B.R. (3d) 161 (Ont. Gen. Div.).

[14] The issue that arises is therefore the characterization of the relationship between the Plaintiff and the Defendant. In *Confederation Life Insurance Co. v. Waselenak*, [1998] 5 W.W.R. 712 (Alta. Q.B.), the court found that there was a contractual relationship and a fiduciary relationship that arose outside of it, but that the contractual relationship was of "signal import" and stood in the way of a declaration of constructive trust. Similarly, in this case characterization of the relationship between the Plaintiff and the Defendant should take into account their common law relationship as well as the arrangement the Plaintiff says they had about the loan. The court will have to decide the relative importance of those circumstances and, in the end, whether there is a juristic reason for any enrichment of the Defendant.

[15] Even if the relationship of debtor and creditor is held to be of main importance in this case, the facts and the underlying relationship are clearly very different than those in *Waselenak*, where an insurer sued a defendant for reimbursement of offsetting disability benefits the defendant received from a workers' compensation board, and *C.I.B.C. v. Melnitzer*, where both parties were financially sophisticated and had a commercial lending arrangement for many years.

[16] The factual differences between these cases may or may not be determinative in the end. But in my view the legal result of the facts is not beyond any doubt and is something best left to the trial judge to determine upon hearing the evidence. This is especially so since the constructive trust is an "equitable remedy which may be granted in order to prevent the unjust enrichment of a person": *C.I.B.C. v. Melnitzer*, at page 183. The Plaintiff should have the opportunity to show why such equitable remedy ought to be granted in her case and that requires a fuller examination of the facts and the law than can be achieved on a summary judgment application.

[17] The Trustee also argued that the Plaintiff's claim does not meet the principles of constructive trust because the Defendant was not enriched. Again, however, there is certainly room for argument that his receipt of the loan proceeds amounts to enrichment.

[18] The relationship between the parties is also of course relevant to the Plaintiff's claim under the *Family Law Act*. The Plaintiff's entitlement to claim equalization of property and thus an interest in the proceeds of sale of the Yellowknife property is what she relies on to argue that the proceeds in court are not the property of the bankrupt divisible among his creditors under s. 67(1) of the *Bankruptcy and Insolvency Act*.

[19] The Trustee argues that the Plaintiff's claim to equalization of property was provable in, and does not survive, the bankruptcy. There is some support for this position in case law decided under Ontario's family property legislation, which also provides an equalization payment scheme. In this case the Defendant's obligation, if any, to make an equalization payment, would have arisen on separation and thus before the bankruptcy in this case. Thus the Plaintiff's claim for the equalization payment would have been provable in the bankruptcy: *Malboeuf v. Malboeuf*, [1994] O.J. No. 1406 (Ont. Gen. Div.).

[20] Although the Plaintiff's counsel referred to her claim under the *Family Law Act* as a claim in property, the case law to date in this jurisdiction indicates that the *Act* does not create a share in ownership of property as such but instead a share in property value through an equalizing transfer of money: *Fair v. Jones*, [1999] N.W.T.J. No. 17 (S.C.). In that case, Vertes J. also noted that the *Family Law Act* is a debtor-creditor statute, not a true property statute (at paragraph 35).

[21] The cases referred to above support the Trustee's position. However, the situation is complicated in this case by the fact that the Plaintiff's claim is based not only on the equalization payment but also on a constructive trust. This issue was not fully argued on the application before me and again is not something that can be resolved by way of summary judgment.

[22] The final ground upon which the Trustee relies for summary judgment is the fact that the Plaintiff did not obtain leave of the court before commencing this action. The statement of claim was filed after the Defendant had declared bankruptcy. In that regard, s. 69.3(1) of the *Bankruptcy and Insolvency Act* provides that on the bankruptcy of any debtor, no creditor shall commence or continue any action for the recovery of a claim provable in bankruptcy until the Trustee has been discharged. That provision is subject to section 69.4, however, which provides that a court may declare that such a stay does not operate in respect of a creditor if there is material prejudice to that creditor or it would be equitable on other grounds to make such a declaration.

[23] In response to the Trustee's argument, the Plaintiff says that she does not need leave because she does not come within the definition of creditor in the *Act* as her claim is one of ownership in property by way of constructive trust. Alternatively, she argues that leave was and is not required because the proceeds of the Yellowknife property were not the property of the bankrupt. To rule on these arguments would be, in effect, to decide the merits of the Plaintiff's case.

[24] Since the matter is not free from doubt, I am not going to rule that the Plaintiff does not require leave and instead I will grant leave *nunc pro tunc*. This is not meant to reflect on the merits of the case in any way, but is done simply to allow the case to proceed. The Trustee did raise the issue of leave at an early date, when it successfully applied to have the noting in default set aside in April 2001. Although it appears from the record that not much has been done by the Plaintiff to pursue this action since then, neither did the Trustee pursue the leave issue until October 2002. However, these are minor considerations. In my view, the Plaintiff should be permitted to pursue her claim in light of the trust and matrimonial aspects of it, which make it at least an arguable claim.

[25] For the foregoing reasons, and although the Plaintiff's case is not without difficulty, I cannot say that this action is bound to fail or that there is no genuine issue for trial. It may well be possible, after examinations for discovery, and if the parties can agree on the facts, to bring this matter on for a ruling on the legal issues, which may then allow the case to be disposed of without the necessity of a trial. However, in my view the issues are not so straightforward as to permit the case to be disposed of on this application for summary judgment.

[26] The Trustee's application is therefore dismissed. As costs normally follow the event, I would be inclined to make an order to that effect. However, should counsel wish to address costs they may do so by arranging, within 30 days of the filing of these reasons, a date to appear before me for that purpose.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
7th day of February 2003

Counsel for the Plaintiff: James Mahon

Counsel for the Trustee in Bankruptcy
of the Defendant: Craig Haynes

CV-08341

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