

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

**BETWEEN:**

DANIEL O'NEILL

**Applicant**

- and -

KATHLEEN RUMAN

**Respondent**

**MEMORANDUM OF JUDGMENT**

[1] This is an application by the Applicant Daniel O'Neill for an Order dismissing this action for want of prosecution pursuant to Rules 327 and 328 of the *Rules of the Supreme Court of the Northwest Territories*, and directing that funds paid into Court be disbursed to the parties. This matter was before me in Family Chambers on June 11, 2015. The Respondent, despite being served, did not appear. For the reasons that follow, I am dismissing this action and ordering that the funds paid into Court be disbursed to the parties.

[2] This action was commenced by Originating Notice on March 14, 2006 wherein the Applicant sought relief including exclusive possession of the family home and equalization of the family property. The Applicant also filed an Affidavit and Statement of Family Property on March 14, 2006. The return date on the Originating Notice was March 17, 2006.

[3] The Respondent filed an Affidavit and Cross Motion in court on March 17, 2006 seeking, amongst other things, exclusive possession of the family home and time to seek legal advice. An Order was made preventing the parties from withdrawing or dissipating any pension plans or investments made by the Applicant or Respondent or involving the business Lady Fit Enterprises Ltd. The

matter was adjourned to March 31, 2006 in order to have the matter set down for a Special Chambers date.

[4] The Respondent filed a Memorandum to the Chief Justice on March 24, 2006 which requested the transfer of the matter to Alberta and the release of joint bank accounts. On March 31, 2006, the matter was confirmed for Special Chambers on April 26, 2006 and the Respondent's request for an adjournment was denied.

[5] The Applicant filed an Amended Originating Notice on April 12, 2006 seeking alternative relief that the family home be put up for sale, pursuant to the *Family Law Act*. The Applicant also filed documents in connection with the Statement of Family Property he had earlier filed.

[6] Following the Special Chambers hearing on April 26, 2006, an Order was made granting the Applicant interim exclusive possession of the family home and requiring the Respondent to vacate the home by May 31, 2006. The Respondent and Lady Fit Enterprises Ltd. were required to provide complete banking records to the Applicant's counsel within thirty days of the Order. The Respondent was required to file a Statement of Family Property and also directed to pay into Court the amount of any funds withdrawn by her from any Lady Fit Enterprises Ltd. bank account. The funds were to be held pending the trial of this matter.

[7] On May 12, 2006, the Respondent paid \$167,000.00 to the Supreme Court to be held in trust pending trial of the matter.

[8] The matter was in Special Chambers again on June 2, 2006 for the Respondent's application to grant a stay of execution of the Order of April 26, 2006. This application was denied.

[9] The Respondent filed appeals from the Orders of April 26, 2006 and June 2, 2006. According to the court files, those appeals were subsequently struck from the list in 2007 and 2008 for failure to comply with filing deadlines pursuant to the Court of Appeal Practice Direction. As the appeals were not restored within six months of the date they were struck, they are deemed abandoned.

[10] The Applicant brought an application to have the Respondent cited in contempt for failing to comply with the April 26, 2006 Order, to have the Respondent's pleadings struck, and to have judgment entered against the Respondent. This matter was in Regular Chambers on June 9, 2006 and was adjourned to set a Special Chambers date. The Special Chambers date was set for

July 10, 2006. On July 10, 2006, the Special Chambers application was adjourned *sine die*.

[11] The Respondent then brought an application to have the Applicant and his counsel cited in contempt, to have the Applicant's pleadings struck out and have judgment entered against the Applicant and his counsel. The matter was in Regular Chambers on August 11, 2006 where it was adjourned *sine die* to be scheduled for a Special Chambers date.

[12] The Applicant brought an application on August 26, 2006 to have the Bank of Nova Scotia provide the complete banking records for Lady Fit Enterprises Ltd. to the Applicant and to have Kevin MacIntyre provide complete business records for Lady Fit Enterprises Ltd. to the Applicant. The presiding Judge declined to make an Order at that time and the matter was adjourned *sine die* to be heard on the same date at the contempt proceedings.

[13] A number of other documents were filed in 2006 and early 2007 by both parties.

[14] The matters were in Special Chambers on September 1, 2007 and were adjourned *sine die* to be set down for hearing by either party on ten days' notice to the other side. Following this, nothing appears to have occurred on the file until 2009 when a Notice of Appointment was filed on August 10, 2009 by the Applicant. Subsequently, documents were filed in 2010 which consisted of a Notice of Intention to Cease Acting filed by the Custodian for the Law Practice of the Applicant's Counsel and the Applicant's Notice of Intention to Act in Person.

[15] The last document filed by the Respondent was a Notice to Disclose filed on January 4, 2007.

[16] Rule 327 (1) provides:

327 (1) A party may at any time apply to the Court for a determination that there has been delay on the part of another party in an action or proceeding and, where the Court so determines, the Court:

(a) may, with or without terms, dismiss the action or proceeding for want of prosecution or give directions for the speedy determination of the action or proceeding; or

(b) shall dismiss so much of the action or proceeding as relates to the applicant where for five or more years no step has been taken that materially advances the action or proceeding.

[17] The Applicant argues that this matter can be dismissed pursuant to either Rule 327(1)(a) or (b). He argues that nothing has occurred on this matter since the Examinations for Discovery of the Respondent which took place on August 24, 2009. Since then, he claims that the Respondent has not complied with the undertakings that arose from the Examinations for Discovery. He also argues that the Respondent has failed or refused to schedule Examinations for Discovery of the Applicant for over 5 years.

[18] A step that materially advances the action or proceeding is one that moves the matter towards trial in a meaningful way: *943639 NWT Ltd. v. Dominion of Canada General Insurance*, 2012 NWTSC 12. Providing answers to undertakings can constitute a step that materially advances the action; it will depend upon the circumstances of each case. As stated in *943639 NWT Ltd.*, *supra* at para. 9:

It is reasonable to assume as well that, in most cases, actually getting the information allows that party to move closer to trial readiness and thus, complying with undertakings and concluding the procedural step of discoveries may be a step that materially advance the action.

[19] In this case, the last possible step that could have been considered to have materially advanced the proceeding was the Examination for Discovery of the Applicant which occurred more than five years before the date of the application. There is no evidence that the Respondent attempted to comply with undertakings as a result of the Examination for Discovery such that could be possibly considered a step that materially advanced the action.

[20] As such, I conclude that no step has been taken that materially advances the action or proceeding for five or more years and I grant the Applicant's application under Rule 327(1)(b). There will be an Order dismissing the action.

[21] In the documents before the Court, each party has made various claims with respect to matrimonial property. As this action is being dismissed, there has been no determination regarding the assets, debts and liabilities contained in the Statement of Family Property filed by each party. However, there remains the money that has been paid into Court by the Respondent.

[22] The Applicant is seeking the disbursement of the money that was paid into Court by the Respondent. The Respondent paid \$167,000.00 to the Supreme Court to be held in trust pending trial of the matter. The money has been deposited in term deposits and with interest accrued, the amount has increased to \$178,511.20, as of October 31, 2015.

[23] In ordering that the Respondent pay money into Court, Justice Richard directed that the Respondent pay the amount of any funds withdrawn from the business bank account. In making this Order, Justice Richard stated in the Memorandum of Judgment dated April 27, 2006, at paragraphs 6-7:

[6] As stated, the Curves business enterprise owned by the two parties was sold on November 2, 2005 for approximately \$200,000. For some reason, Ms. Ruman was the sole signing authority for the business bank accounts. Mr. O'Neill states in his affidavit that he obtained a bank statement for the business on March 7, 2006 and learned that there was approximately \$91,000 in the various business accounts, and expresses his concern for the whereabouts of the sale proceeds of \$200,000. Ms. Ruman has been less than forthcoming with the Court on this matter of withdrawals from the business bank accounts. In her first affidavit in response, affirmed March 16, 2006, she states her objection that Mr. O'Neill obtained this information from the Bank on March 7, 2006 without her consent. In her affidavit affirmed April 18, 2006 she discloses that on December 22, 2005, at the request of the assistant bank manager, she "removed" \$180,000 from Lady Fit Enterprises (Curves) account number 10629 00104 13 to a "safer" corporate account. In that affirmed affidavit she did not disclose the account number of that safer corporate account, nor what disposition, if any, was made of the \$180,000 subsequent to its transfer into the safer corporate account. In chambers on April 26, 2006, Ms. Ruman stated to the Court that she had made a number of payments out of this \$180,000, including a transfer in January 2006 of "what was mine" into her own personal savings account. Yet she could not, or would not, disclose to the Court the amount of that transfer in January 2006.

[7] Ms. Ruman's stated rationale for this withdrawal is her interpretation of a September 30, 2005 document signed by Mr. O'Neill which she alleges is the parties' agreement. This document was entered into evidence, and my reading of the document indicates to me that if it purports to be an agreement, it is unclear and incomplete and will obviously have to be interpreted at the trial by the presiding judge. On its face it does not purport to deal with the sale proceeds.

[24] Following the Judgment, the Respondent filed a Statement of Family Property, several Affidavits and two volumes of financial records related to Lady Fit Enterprises Ltd.

[25] The documents reveal that the business Curves was sold for \$207,000.00 (including \$2,000.00 deposit) in November 2005. The amount to close was \$205,000.00 and following the deduction of the commissions, fees and disbursements, \$194,255.87 remained. That amount was deposited into Lady Fit Enterprises Ltd. Scotiabank account on November 2, 2005. A number of cheques were debited from the account following November 2, 2005 including three cheques to the Applicant for \$10,000.00, \$8,511.00 and \$5,000.00. It is not clear from the documents why these payments were made to the Applicant. On

December 22, 2005, \$180,000.00 was withdrawn from the account and the Respondent has admitted that she withdrew the money and placed it in another account.

[26] Subsequent to paying \$167,000.00 into court on May 12, 2006, the Respondent has never provided an explanation for why the full \$180,000.00 was not paid into Court nor has the missing \$13,000.00 been accounted for.

[27] The amount that has been paid into court is currently \$178,511.20. The Applicant has argued that one half of the sale price of \$207,000.00 should be divided equally between the parties and the accrued interest also be divided on an equal basis. He has suggested that this would result in \$111,100.00 being transferred to him, consisting of \$103,500.00 as a half of the proceeds plus \$7,600.00 in interest.

[28] The problem with the approach suggested by the Applicant is that this does not take into account the costs to complete the sale and thus, the amounts he has suggested are not correct. Furthermore, the Court does not have complete financial information with respect to Lady Fit Enterprises Ltd. and how the proceeds of the sale of the Curves business were distributed. This is mainly a result of the failure of the Respondent to provide complete information or to respond to the application. In addition, there has been no explanation for the payments that were made to the Applicant of \$23,511.00 in the days following the deposit of the \$180,000.00 to the Scotiabank account.

[29] While this matter could be brought back into Court to allow the parties an opportunity to provide further evidence and submissions, it would not be appropriate in the circumstances. The Respondent's consistent lack of cooperation in the matter, her failure to respond to the application and the passage of time since the events in question have resulted in significant delays in this matter being dealt with.

[30] The parties make various claims with respect to Lady Fit Enterprises Ltd. in their respective Affidavits. As this matter has not proceeded to a hearing and the documents before the Court are not complete, there is insufficient information to come to any conclusions regarding some of the claims. However, both parties appear to have agreed that they each had a 50% interest in the business. Therefore, I have proceeded on this basis and made a determination based upon the documents which are before the Court.

[31] While the Curves business was sold for \$207,000.00, there were costs associated with the sale. The amount which was received by the parties upon

closing, minus those costs, would have been \$194,255.87. Of that amount, it appears that \$23,511.00 was paid to the Applicant and \$13,000.00 is unaccounted for by the Respondent. Deducting those amounts from each parties equal share would result in a payment of \$84,124.94 to the Respondent and \$73,616.94 to the Applicant. That would leave \$20,769.32 remaining in trust.

[32] It is difficult to determine what should be done with the remaining money as the financial records from Lady Fit Enterprises Ltd. are not complete. It is not apparent to me what, if anything, happened to the other funds in the Scotiabank account, whether there are other current outstanding debts or how any debts may have been paid.

[33] While it would be reasonable to divide the remaining amount equally as the parties agree that they each held an equal share of the Curves business, that does not take into account the efforts that the Applicant has taken to have these matters dealt with since filing the Originating Notice in 2006 and the reluctance that the Respondent has consistently demonstrated responding to the applications or producing the required documents. Taking into account the history of this matter, I am of the view that the remaining \$20,769.32 and any further interest that has accrued since October 31, 2015 should be paid to the Applicant.

[34] Therefore, for these reasons, there will be an Order dismissing this matter and disbursing the funds held in trust by the Court to the Respondent in the amount of \$84,124.94 and the remainder to the Applicant.

[35] There will be no order as to costs.

S.H. Smallwood

J.S.C.

Dated in Yellowknife, NT, this

13<sup>th</sup> day of November 2015

Counsel for the Applicant : Self Represented

Counsel for the Respondent : Self Represented

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**THE HONOURABLE JUSTICE S.H. SMALLWOOD**

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