

Citation: Carla M. Courtenay Law
Corporation v. L [REDACTED]
2001 BCCA 82

Date: 20010216
Docket: CA026177
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

CARLA M. COURTENAY LAW CORPORATION

PLAINTIFF
(RESPONDENT)

AND:

P [REDACTED] L [REDACTED] a.k.a. P [REDACTED] L [REDACTED]

DEFENDANT
(APPELLANT)

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Cumming
The Honourable Madam Justice Prowse

M.E. Mortimer, Q.C. Counsel for the Appellant

A.E. Thiele Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
October 12, 2000

Place and Date of Judgment: Vancouver, British Columbia
February 16, 2001

Written Reasons by:

The Honourable Chief Justice McEachern

Concurred in by:

The Honourable Mr. Justice Cumming
The Honourable Madam Justice Prowse

Reasons for Judgment of the Honourable Chief Justice McEachern:

[1] The plaintiff in this action, a lawyer, was retained by the defendant's wife in relation to family law matters, following a separation. I shall call the plaintiff "the lawyer"; her client "the wife" and the wife's husband "the husband". The wife lived here and the husband lived elsewhere. They had previously lived in England where the husband had interests in property and a debt for £150,000 secured by a promissory note in favour of his brothers. The available material indicates that this debt was not an obligation of the wife although the husband alleged otherwise.

[2] On January 9, 1996, the lawyer obtained a judgment in the sum of \$250,500 for the wife against the husband in **Family Relations Act** proceedings in the Supreme Court of British Columbia.

[3] In May 1997, the husband visited the wife in Edmonton, Alberta. He alleges that they agreed that the wife would dismiss her action in exchange for a release of her alleged obligation for the debt mentioned above. In the same month, the lawyer was instructed by the wife to not take any further proceedings to recover the amount of the judgment already obtained, and the lawyer's retainer was terminated. The

lawyer submitted her account in the sum of \$32,542.43 on June 10, 1997.

[4] Also on June 10, 1997 a Praecipe was filed in the **Family Relations Act** action on behalf of the wife stating:

Please enter the attached Consent Dismissal Order pursuant to Rule 41(16) of the Rules of Court.

No party to this action is an infant or under any legal disability.

[5] The attached Order recited that "All Parties have consented to this Order" and "No person involved is under any legal disability." The operative part of the Consent Dismissal Order provides that the order pronounced January 9, 1997 be set aside, and that "the within proceedings be dismissed without costs as if the same had been tried on its merits." This is somewhat unusual because the action had already been tried on the merits.

[6] Also filed was an affidavit of the wife sworn June 4, 1997 which stated simply:

I have resolved this matter with the Defendant and wish to have [the order pronounced January 9, 1997] set aside.

[7] It appears that this matter was referred to the judge who gave judgment for the wife in the January 9, 1997 order because that judge's initials appear on the Consent Dismissal

Order which is dated June 16, 1997. Such referral seems to have been required by the provisions of Rules 41(16.2) or 41(16.4). The material does not disclose what happened on the referral to the judge. At that time, the lawyer was still the wife's solicitor of record but she received no notice of this application. The Order setting aside the judgment was entered the next day, June 17, 1997 and a Notice to Act in Person signed by the wife was filed the same day.

[8] In July 1997, the lawyer brought an action against the wife for the payment of her account. An application was made by the wife for a hearing questioning the account but that matter did not proceed.

[9] In November 1997, an order was made in separate divorce proceedings dissolving the marriage between the husband and the wife. The decree provided that no maintenance would be payable by either party, that the husband would be solely responsible for the promissory note debt, and each party quit claimed any interest in assets in the possession or title of the other of them.

[10] In July 1998, the wife made an assignment in Bankruptcy. She did not list her judgment against the husband in her statement of assets. The lawyer was the only proven creditor of the wife's estate and the lawyer was authorized under s. 38

of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3 to bring this action.

[11] At trial only the lawyer and the husband gave evidence. The trial judge doubted whether the wife had adequate independent advice or received consideration for what she did, but he was unable to find that the consent order dismissing the wife's action against the husband was intended to defeat the lawyer's claim. He concluded, however:

[12] Parties can agree to a consent dismissal of an action before a judgment is granted. However, once a judgment has been granted, the action is concluded. In order to set aside or vary a judgment, it is necessary to file a notice of motion and supporting affidavits which must be considered and ruled upon by a judge of this Court. This did not occur. Accordingly, the \$250,000 Judgment granted by Boyd J., still exists and is an asset of the bankrupt's estate. The plaintiff is to have the costs of this action.

[12] The real question on this appeal relates to the validity, *qua* the plaintiff, of the consent order setting aside the wife's judgment.

[13] First, with respect, a question may arise whether the referral judge was *functus* when she authorized the entry of the consent order.

[14] Judges, of course, are authorized to make orders to "work out" the details of a judgment previously pronounced, but

setting aside an entered judgment, even with the consent of all parties, is a most serious matter because non-parties may be involved. For example, a judgment may have been assigned, or garnishee proceedings may be underway, money paid into Court, or, as in this case, the judgment may be registered here or in some other jurisdiction. In such circumstances difficult consequences may result from setting aside a judgment. However, I prefer not to base my decision on the judge being *functus*.

[15] Instead, I prefer the course followed by the learned trial judge although, with respect, I would enlarge somewhat on what he said. Generally speaking, the referral of any matter to a judge requires a decision on the part of the judge acting judicially rather than administratively: **Shnier v. Shnier** (1994), 93 B.C.L.R. (2d) 310 (B.C.C.A.). In a matter such as this one, however, Rule 52(2)(d), which is phrased in mandatory terms, requires "applications to vary or set aside a judgment;" to be heard and disposed of by the court in chambers. In such proceedings the judge should make careful inquiries about other interests that might be involved and direct that all interested parties be served. The device of changing or dismissing counsel and making private deals to avoid the payment of legal fees is well known in the law.

Even though such was not found to be the case here, the judge to whom the application was referred should have been alerted to that or other possibilities and a hearing as contemplated by the Rules of Court should have been ordered.

[16] The dangers of setting aside an order by consent without a hearing were highlighted in my decision in *Saskatoon Credit Union Limited v. Central Park Enterprises Ltd. et al.* (1988), 22 B.C.L.R. (2d) 89 (B.C.S.C.) where a judgment finding fraud against a defendant was set aside by a consent order made by a Court of Appeal judge. The Court of Appeal order purported to allow the appeal and to set aside the judgment under appeal. When other parties having similar claims as the original plaintiff brought actions, the defendant pleaded that it had been judicially determined by the Court of Appeal that he had not committed the very fraud alleged against him.

[17] I disallowed the plea on the ground that the consent order bound the parties but not other interests that were not represented on the application for the consent order. The defendant, on the other hand, was precluded from making arguments on any legal questions that had already been decided against him at the original trial. Similarly, in this case the agreement of the parties to set aside the order is binding on them, absent some defect arising from a special plea such

as fraud or undue influence, but it cannot bind third parties such as the plaintiff in circumstances such as these.

[18] With his usual resourcefulness, Mr. Mortimer argued that the referral judge must be presumed to have given adequate consideration to all relevant factors and that she could have directed notice to other interested parties if she thought it was necessary to do so. He argued that this was a collateral attack upon the consent order that cannot be entertained in these proceedings. He also argued that the result would have been the same even if the matter had proceeded in chambers.

[19] In my judgment, however, these arguments cannot prevail in the face of the clear language of Rule 52(2)(d) which requires that an application to set aside or vary a judgment be heard and disposed of in chambers. In this case, such an application should have been made upon notice to the lawyer who was the lawyer of record and, possibly the holder of a lien on the judgment being set aside.

[19] The fact that a subsequent order was made whereby the husband and wife quit claimed all interests in any asset in the title or possession of the other of them, while binding on the parties, does not have the effect of setting aside the order made on January 9, 1996 granting the wife judgment against the husband.

[20] Thus, I would dismiss the appeal and confirm that with respect to the lawyer, the wife's judgment against the husband remains an asset of the wife's estate upon which appropriate execution proceedings may be taken.

"The Honourable Chief Justice McEachern"

I AGREE:

"The Honourable Mr. Justice Cumming"

I AGREE:

"The Honourable Madam Justice Prowse"