Bell v. Bell

Thomas Bell, Applicant and Lorie Bell, Respondent

Ontario Superior Court of Justice

Olah J.

Heard: November 17, 2011
Judgment: November 25, 2011

Docket: Newmarket FC-11-00037791-0000

Counsel: Rodica David, Diana Isaac, for Applicant
John P. Schuman, for Respondent

Olah J.:

Introduction

1 On September 28, 2011, the parties were before me on the respondent wife's motion for disclosure, disbursements, and monies for accommodation. I rendered my decision orally in court.

2 After delivering my oral reasons, counsel for the applicant requested that I reconsider my decision, I permitted the applicant's counsel to make further submissions on the points of reconsideration, after which I declined to change the order.

3 Today, the applicant husband brings a motion for the following relief:

1. A rescission of paragraphs 3 and 4 of my endorsement dated September 28, 2011;

2. Dismissal of the respondent's motion for interim costs, disbursements, and rent; and

3. Costs of the motion on a full-recovery basis.

4 The respondent wife seeks the following relief:

1. Costs against the applicant in relation to the preparation of an affidavit of documents in the amount of $8,167.07;

2. Costs of her motion fixed at $5,715.06;

3. Costs of the appointment to settle the wording of the order in the amount of $750; and

4. Costs of the telephone conference call motion to determine whether or not the order was interim or final in the amount of $150.

5 The applicant husband does not base his motion on rule 25(15), rather he relies on the common law to ground the basis for the motion.[FN1] I agree with the applicant's contention that I am not governed by rule 25(19), as the impugned endorsement was neither issued nor entered, as an order. In this case the parties agreed not to enter nor issue the order, so as to facilitate the applicant's motion for the relief sought. In any event, I am advised by the applicant's counsel, that the applicant has himself filed an appeal of the interim order, in the event that the current endorsement is not revised as requested.

6 Further, the matter was not brought by way of rule 25(19) because, had the order been issued and entered, the applicant would have the onus to establish that the endorsement was obtained by fraud, mistake, or lack of notice. Unfortunately for the applicant, no such evidence was alleged.

7 Essentially, the applicant argues that the applicant's counsel was not provided with adequate time to fully address all issues before me; and, because of my imposition of time constraints for argument, she did not adequately address all the issues. Although this position was not strenuously advanced, it must fail on its merits. Both counsel had adequate and equal opportunity to argue their case. I had read all the materials filed and the time limits for submissions were reasonable in the circumstances, as each party exceeded the allocated one-hour for the motion to be heard.

8 More strenuously advanced by the applicant's counsel were the following;

1. New evidence has arisen which would affect my disposition.

2. The order for payment of rent was essentially an order for spousal support, and as such, I exceeded my jurisdiction to make such order.

3. Alternatively, the order for payment of rent was an order for disbursements, which exceeded the amount of disbursements requested.

4. Alternatively, the order for disbursements must be rescinded in that the particulars of the requested disbursements were lacking.

5. Lastly, a rescission of my endorsement must be considered in light of the fact that it is very difficult to obtain leave to appeal an interim order in Ontario.

Review of the case law

9 The applicant's counsel cited the below referenced cases, which I have reviewed and provided my comments as follows:

1. Premi v. Khodeir, at paragraph [2]:[FN2]

> [2] The formal order arising from the motion judge's July 14, 2009 decision had not been issued as of January 22, 2010. Accordingly, the trial judge was not functus.

10 I agree.

2. Church v. Church, Perkins J.:[FN3]

> [4] Because the mother's motion to correct my December 20 decision was served before signature of a formal order embodying the decision, I was not, and because no order has yet been signed, I still am not functus officio. Accordingly it is open to me to change aspects of both the decision itself and the reasons for my decision....

11 In circumstances as cited above, it is open to me to change my motion decision and reasons for that decision. However, in this cited case, initially Perkins J. was correcting a typographical error; however, he also addressed the further evidence of the moving party in her attempt to change the original endorsement. Upon Perkins J.'s review, the further evidence did not compel him to change his initial endorsement, Nevertheless, I must review the new evidence presented by the applicant husband to assess whether this information would compel me to change my initial order.

3. C hildren's Aid Society of Northumberland v. H. (K.L.), Timms J.:[FN4]

> [11] It is my conclusion that there is no rule of common law that says that a judge is functus once an appeal has been launched from his or her judgment. The jurisdiction remains but should be exercised very sparingly....

12 After a trial, Crown wardship without access order issued. Although, no formal order issued, an appeal was filed, and the moving party moved that the judge reconsider his order on compelling fresh evidence. Timms J. exercised his discretion to reconsider; however, he cautioned that his jurisdiction to do so be exercised sparingly. His decision to reconsider is based on our Court of Appeal's decision in DeGroote v. Canadian Imperial Bank of Commerce, at paragraph 3:[FN5]

> [3] The decision whether or not to reopen the motion was discretionary. While the test has been expressed in a number of different ways, it essentially comes down to this, The court must consider whether the evidence would probably have changed the result and whether that evidence could have been discovered by the exercise of due diligence. The reasonable diligence requirement will, however, be relaxed in exceptional circumstances where necessary to avoid a miscarriage of justice.

13 In the current case, Dr. Bell's finances are more akin to the determination of income and expenses, as in a commercial case. My understanding of the new evidence is that Dr. Bell had a visit from the Canada Revenue Agency, which agency emptied the applicant's business bank account on October 28, 2011, leaving him to scramble to pay his other outstanding liabilities.

14 Firstly, a visit by the Canada Revenue Agency does not itself give rise to an "exceptional circumstance" which would cause a miscarriage of justice as in the Northumberland CAS case. Dr. Bell's liberty of person is not at issue.

15 Secondly, a review of the applicant's first financial statement identifies the income tax arrears arrangement between the applicant and the Canada Revenue Agency, which was in default as at April 2011. Clearly, Canada Revenue Agency's actions were highly probable and within the application's contemplation at the time of the motion and certainly within my contemplation when the initial motion was argued.

16 The respondent's counsel suggested that in Pakka v. Nygard, Kiteley J. ruled that in order to succeed in an application for disbursements, the motion must be supported by documentation which details the disbursement requested. My reading of such position does not result in such a definitive conclusion, in that Kiteley J. states at paragraphs 81 and 82 as follows:[FN6]

> [81] ... She does not have sufficient resources to fund the analysis. The complexity of the defendant's circumstances make it essential that the plaintiff have assistance. Any prudent litigant would engage an expert. The claim of the plaintiff is meritorious. These disbursements are required to level the playing field.
>
> [82] Having said that, I would have preferred to have somewhat more detail from Mr. Penner as to the hours which he expected to be engaged ... However, even in the absence of more detail, I sec no reason why the plaintiff ought not to be afforded at least the same resources as the defendant has spent to date, ...

17 Based on the affidavit evidence and arguments before me establishing the required costs for lawyer fees, assessments, valuations — despite the minimal detail, as in Pakka, I made the necessary order for the disbursements. As such, this is an issue for an appeal rather than reconsideration.

18 Further, whether or not the court addressed the applicant's ability to pay the disbursements as requested is, again, an issue for the appellate court's determination and not for reconsideration.

19 The respondent's counsel relied on sections of the Family Law Act and cases; which I have reviewed and provided my comments as follows:[FN7]

1. West v. West, Perkins J. states at paragraph 23 as follows:[FN8]

> The jurisdiction to set aside or change an order to prevent a miscarriage of justice are ancient.... The cases have laid down a fairly stringent test before it will be exercised.... The evidence presented at the motion must be clear and credible; it must be of such a nature that the original order would have been different if the evidence had been available; ...

20 In this case, as in the West case, the applicant does not meet the test enunciated in West. His new evidence of the Canada Revenue Agency "scoop" could reasonably have been known to the applicant.

21 As in West, at paragraph 24, Perkins J. concluded — "His problem was not that the evidence did not exist or could not be discovered with due diligence, but rather that I did not accept his evidence at the time."

22 To rebut the argument that accommodation costs are akin to spousal support, which were not specifically pled, the respondent argues:

(a) I have jurisdiction to make such order because section 34 of the Family Law Act permits me to do so. Section 34 reads as follows:

> 34. POWERS OF COURT — (1) In an application under section 33, the court may make an interim or final order,
>
> (a) requiring that an amount be paid periodically, whether annually or otherwise and whether for an indefinite or limited period, or until the happening of a specified event;
>
> (b) requiring that a lump sum be paid or held in trust;
>
> (c) requiring that property be transferred to or in trust for or vested in the dependant, whether absolutely, for life or for a terra of years;
>
> (d) respecting any matter authorized to be ordered under clause 24(1)(a), (b), (c), (d) or (e) (matrimonial home);
>
> (e) requiring that some or all of the money payable under the order be paid into court or to another appropriate person or agency for the dependant's benefit;
>
> (f) requiring that support be paid in respect of any period before the date of the order,
>
> (g) requiring payment to an agency referred to in subsection 33(3) of an amount in reimbursement for a benefit or assistance referred to in that subsection, including a benefit or assistance provided before the date of the order;

(h) requiring payment of expenses in respect of a child's prenatal care and birth;

(i) requiring that a spouse who has a policy of life insurance as defined under the Insurance Act designate the other spouse or a child as the beneficiary irrevocably; [FN9]

(j) requiring that a spouse who has an interest in a pension plan or other benefit plan designate the other spouse as beneficiary under the plan and not change that designation; and

(k) requiring the securing of payment under the order, by a charge on property or otherwise.

(b) This above section also references section 24:

24. ORDER FOR POSSESSION OF MATRIMONIAL HOME — (1) Regardless of the ownership of a matrimonial home and its contents, and despite section 19 (spouse's right of possession), the court may on application, by order,

(a) provide for the delivering up, safekeeping and preservation of the matrimonial home and its contents;

(b) direct that one spouse be given exclusive possession of the matrimonial home or part of it For the period that the court directs and release Other property that is a matrimonial home from the application of this Part;

(c) direct a spouse to whom exclusive possession of the matrimonial home is given to make periodic payments to the other spouse;

(d) direct that the contents of the matrimonial home, or any part of them,

(i) remain in the home for the use of the spouse given possession, or

(ii) be removed from the house for the use of a spouse or child;

(e) order a spouse to pay for all or part of the repair and maintenance of the matrimonial home and of other liabilities arising in respect of it, or to make periodic payments to the other spouse for those purposes; ...

(f) to substitute other real property for the matrimonial home, or direct the person to set aside money or security to stand in place of it, subject to any conditions that the court considers appropriate.

23 Whether or not I agree with the respondent's counsel's argument is not the point. The application of these sections to the facts presented and the resultant order can only be addressed by appeal and not reconsideration. The applicant and the respondent acknowledged that the matrimonial home was sold and the respondent wife and the children required suitable alternate accommodation.

24 To rebut the argument that there was no basis on which to find the cost of the alternate accommodation, the respondent's counsel referenced the respondent's affidavit of September 22, 2011, with respect to the range of monthly and annual rent payable.

Conclusion

25 The applicant's request for reconsideration does not give rise to an objective concern for a miscarriage of justice, such that a court would exercise its jurisdiction.

26 The applicant husband's motion is dismissed.

27 The September 28, 2011 endorsement may be remitted to me for execution, issuance, and filing.

Costs

28 The respondent's claim for costs for production and disclosure is dismissed without prejudice to the respondent's claim at trial. The respondent's claims for both settling the order and the telephone conference are reasonable under the circumstances and I order that the applicant husband pay to the respondent wife, forthwith, the following costs;

1. Costs of the appointment to settle the wording of the order dated September 28, 2011, in the amount of $750.

2. Costs of the telephone conference call motion, to determine whether or not the order was interim or final, in the amount of $150.

29 With respect to the motion herein, if the parties cannot agree on costs, written cost submissions may be made. All submissions are restricted to 3 pages,[FN10] exclusive of bill of costs and offers to settle, by serving and filing submissions at the appropriate court office and remitting same to my judicial secretary, Nicole Anderson, in Barrie. Counsel for the applicant may serve and file cost submissions within 30 days of the release of this judgment Counsel for the respondent may serve and file their response within 15 days thereafter and counsel for the applicant may serve and file their reply within 7 days thereafter.

Order accordingly.

FN1. Family Law Rules, O. Reg. 114/99.

FN2. Premi v. Khodeir, 2010 ONCA 721, [2010] W.D.F.L. 5223, 2010 CarswellOnt 8223 (Ont. C.A.) at paragraph [2].

FN3. Church v. Church (2003), 40 R.F.L. (5th) 43, 2003 CarswellOnt 1912 (Ont. S.C.J.).

FN4. Children's Aid Society of Northumberland v. H. (K.L.), [2002] O.J. No. 245 (Ont. S.C.J.) (Jan 04, 2002). [Northumberland CAS].

FN5. DeGroote v. Canadian Imperial Bank of Commerce (1999), 121 O.A.C. 327, [1999] O.J. No. 2313, 1999 CarswellOnt 1902 (Ont. C.A.), at paragraph 3.

FN6. Pakka v. Nygard (2002), 61 O.R. (3d) 328, 2002 CarswellOnt 3403 (Ont. S.C.J.) at paragraphs 81 and 82. [Pakka].

FN7. Family Law Act, R.S.O. 1990, c. F-3.

FN8. West v. West (2001), 18 R.F.L. (5th) 440, 2001 CarswellOnt 1936 (Ont. S.C.J.). [West].

FN9. Insurance Act, R.S.O. 1990, c.I-8.

FN10. Comply with the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. Subrule 4.01(1): Standards — Documents in Writing.