

CITATION: Saunders v. Ammar, 2018 ONSC 6252
NEWMARKET COURT FILE NO.: CV-17-133623-00
DATE: 20181022
CORRIGENDA: 20190124

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
David Saunders)
) A. Shahmiry, for the Plaintiff
Plaintiff)
)
- and -)
)
)
Sheena Nada Ammar) E. Hiutin and A. Joannis, for the Defendant
)
Defendant)
)
) HEARD: October 4, 2018

RULING ON MOTION TO DISCHARGE A CERTIFICATE OF PENDING LITIGATION

Text of original decision has been amended with changes appended (released today's date).

SUTHERLAND J.:

Introduction

- [1] This is another motion that illustrates the obligation of a moving party on an *ex parte* motion to present full, frank and fair disclosure.
- [2] The defendant brings a motion to discharge the certificate of pending litigation (CPL) granted on an *ex parte* motion to the plaintiff by my order dated April 4, 2018 which was registered against the residence of the defendant's residence municipally known as 58 William Bartlett Drive, Markham, Ontario ("the property"), as instrument number YR2819854.
- [3] The plaintiff brings a cross-motion requesting that the motion of the defendant be dismissed, failing which, an order be granted that fifty percent of the net proceeds of sale from any sale or transfer of the ownership of the property be paid into court.
- [4] At the hearing, I was advised that there is urgency given that the mortgage registered on the property expires October 19, 2018. Given the urgency, I delivered an endorsement

with my disposition of the motions on October 16, 2018. In my endorsement, I indicated that reasons would follow.

[5] Below are those reasons.

Background

[6] The action arises from a relationship between the plaintiff and the defendant.

[7] The plaintiff, a senior tax partner at a large international accounting firm, met the defendant at an adult entertainment establishment in Concord, Ontario. The plaintiff and the defendant commenced a relationship that the plaintiff categorized as an intimate relationship in his affidavit in support of his *ex parte* motion for a CPL.

[8] The defendant deposed in her affidavit in support of her motion, that the relationship was one of fee for service. Notwithstanding that both parties agree that there was no sexual component to their relationship, for a period of approximately 4-5 years, the plaintiff did pay substantial monies to the defendant along with purchasing a luxury vehicle, a Porsche Cayenne. The plaintiff estimates the amount of monies paid to the defendant through bank transfers, cheques and credit card charges to be approximately \$500,000.

[9] The plaintiff does not disagree that he paid monies to the defendant and purchased her a Porsche, he deposes; however, in his affidavit in response to the defendant's motion and in support of his motion the monies paid were separate and apart from the monies he paid to the defendant for the purpose of the property. The defendant deposes that there was an agreement between him and the defendant that the monies he paid towards the property were paid because he would have an interest in the property; he would be entitled to fifty percent of the net proceeds of the property.

[10] There is no written agreement between the parties.

[11] The defendant disputes the claims of the plaintiff and deposes that no monies were provided that were designated to purchase the property. The defendant deposed that the monies paid were hers to use anyway she deemed appropriate. There were monies paid because the plaintiff demanded that she stop working and he would support her to be his "kept woman."

[12] For the purposes of this motion, I believe it is crucial to understand the timeline of the proceedings and the relationship of the parties.

Timeline

[13] The plaintiff and the defendant met in 2012. Their relationship ended around October 2016.

[14] The plaintiff commenced the action on November 27, 2017 and amended the claim on December 4, 2017.

- [15] The defendant served a Notice of Intent to Defend on December 21, 2017.
- [16] The plaintiff swore his affidavit in support of his *ex parte* motion on January 11, 2017.
- [17] The defendant served her Statement of Defence, with no counterclaim, on January 31, 2017.
- [18] On February 2, 2017, the defendant's counsel sent a without prejudice letter to the plaintiff's counsel setting out, in detail, her position on the claim and on the relationship between her and the plaintiff. Defendant's counsel also indicated that if this matter could not be resolved the defendant would amend her pleading by adding a counterclaim for monies owed in the amount of \$500,000.
- [19] On February 12, 2017, the plaintiff served his Reply.
- [20] On March 7, 2017, defendant's counsel sent a follow up letter requesting a response to his without prejudice letter of February 2, 2017.
- [21] On March 16, 2017, plaintiff's counsel responds to the defendant's March 7, 2017 letter indicating that the plaintiff was out of the country and upon his return, a response would be provided.
- [22] On March 16, 2017, the plaintiff filed another affidavit deposed by his counsel's assistant.
- [23] On March 29, 2017, the plaintiff filed his *ex parte* motion for a CPL.
- [24] On April 4, 2017, this court made the order granting a CPL.
- [25] On April 19, 2017, defendant's counsel sent a further letter to the plaintiff's counsel again requesting a response to his letters dated February 2 and March 7, 2017.
- [26] On April 25, 2017, the plaintiff registered the CPL on title to the property.
- [27] Early May 2017, the defendant is served with my order dated April 4, 2017, the *ex parte* motion material, and the registration particulars of the CPL.

Legal Principles

- [28] Section 103 of the *Courts of Justice Act*¹ and Rule 42 of the *Rules of Civil Procedure*² governs the courts authority to grant a CPL and to discharge a CPL.
- [29] Section 103(6) the *Courts of Justice Act* sets out factors when a court may make an order discharging a CPL.

¹ RSO 1990 c. C.43

² RRO 1990, Reg. 194

- [30] A moving party may bring a motion, without notice, seeking a CPL. However, to bring such a motion, the moving party has obligations that do not exist if the motion is brought with notice.
- [31] Rule 39.01(6) states that when a motion is made without notice, the moving party shall make full and fair disclosure of all material facts and “failure to do so is in itself sufficient ground for setting aside any order obtained in the motion.”
- [32] The positive obligation for a moving party to provide full, frank and fair disclosure is for the protection of the absent party and to mitigate risk of injustice.
- [33] Justice Sharpe stated in *United States of America v. Friedland*³:

For that reason, the law imposes an exceptional duty on the party who seeks ex parte relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of inherent in any situation where a Judge is asked to grant without hearing from the other side.

- [34] The positive obligation is obviously onerous for good reason. The threshold of establishing failure of a moving party to adhere to the positive duty to provide full, frank, and disclosure is not a high one⁴. Courts have indicated that:
- (a) There is no requirement to show an intention to mislead, careless non-disclosure is sufficient.⁵ The threshold question is whether the material facts omitted might have made an impact on the granting of the original order.⁶
 - (b) Material facts must be readily and clearly highlighted to the court and referred to in the affidavit. These material facts cannot be buried or hidden in exhibits.⁷
 - (c) To present fair disclosure the moving party counsel, as an officer of the court, is to provide full, frank and fair disclosure of material facts and “advocacy, must of necessity, take a back seat”⁸

³ [1996] O.J. No. 4399 (Gen. Div.), para. 27.

⁴ *Newtec Print & Copy Inc. v. Woodley*, [2001] O.J. No. 4180, SCJ leave to appeal refused, [2001] O.J. No. 5634 (Div. Ct.)

⁵ *Rosenhek v. Kerzner*, [1997] O.J. No. 2831 (Gen. Div.) affirmed on appeal [1998] O.J. 4408 (Ont. C.A.)]

⁶ *830356 Ontario Inc. v. 156170 Canada Ltd.*, [1995] O.J. No. 687 (Gen. Div.)

⁷ *830356 Ontario Inc.*, supra, footnote 6

⁸ *Mueller-Hein Corp. v. Donar Investments Ltd.*, [2003] O.J. No. 2302 (SCJ), at para 48

- [35] Material facts are any facts that would have been weighed or considered by the motion's judge in deciding the issues, regardless of whether its disclosure would have changed the outcome.⁹
- [36] It is not for the moving party or its counsel to decide not to disclose material facts because they do not agree with the facts or have another interpretation of the facts. Material facts must be disclosed, whether the facts assist or not in obtaining the relief requested by the moving party. The disclosure needs to be fair and balanced.
- [37] Failure to comply with the positive duty to provide full, frank and fair disclosure of material facts may lead to the order given being set aside.
- [38] Again, as Justice Sharpe stated in *United State of America v. Friedland*:

If the party seeking ex parte relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party.¹⁰

- [39] I will now turn to the case at hand.

Analysis

- [40] There were material facts the plaintiff failed to disclose to the court on the original CPL motion. The plaintiff conceded that there were material facts that were not disclosed. These facts were:
- (a) The existence of a "without prejudice" letter from defendant's counsel dated February 2, 2018 and the position taken by the defendant on the merits of the plaintiff's claim.
 - (b) That plaintiff's counsel was in communication with defendant's counsel. There were numerous emails received by the plaintiff from the defendant's counsel. The correspondence received show that the defendant's counsel was active and involved in this proceeding. A proposal to settle was received by the plaintiff from defendant's counsel.
 - (c) The nature of the plaintiff's relationship with the defendant; that the relationship was one based on fee for service and not "an intimate relationship," as suggested by the plaintiff in his affidavit.

⁹ *H.J. Sutton Industries Ltd (cob Quality Home Products Ltd) v. Assured-Packaging Inc.*, [2001] O.J. No. 5634

¹⁰ *Supra*, footnote 3, at para 28

- (d) That the plaintiff attempted to have his name registered on the property when the defendant purchased the property and the defendant refused.

[41] In reviewing the affidavits filed on these motions, I find that the plaintiff also failed to disclose the following material facts:

- (a) That the defendant obtained a mortgage based on income that she received from the plaintiff.
- (b) That the plaintiff, through his accounting firm, paid the defendant for work and declared the monies paid as income to the defendant for which she would be obligated to pay taxes and then were claimed as a deduction by the plaintiff on his income.
- (c) That demand for monies by the plaintiff were only made after the plaintiff was suffering financial difficulties due to tax liabilities.
- (d) The income received by the defendant came from the plaintiff.
- (e) The plaintiff stopped working in the adult entertainment business and her source of income to live came from the plaintiff.
- (f) The parties never engaged in sexual relations.
- (g) That the plaintiff provided the defendant with blank cheques.

[42] The disclosure provided by the plaintiff on the without notice motion was neither full, frank, nor fair. The plaintiff did not provide a balanced disclosure of the true nature of his relationship with the defendant. The plaintiff did not provide a robust disclosure of the communications from counsel of the defendant.

[43] The plaintiff does not disagree that he received a proposal to settle the action but did not respond to that proposal and that he told defendant's counsel that he was out of the country all the while preparing the *ex parte* motion material for a CPL. The plaintiff did not communicate with the defendant's counsel until after receiving the order for a CPL and serving the order and motion material upon the defendant.

[44] In addition, not only did the affidavit provided by the plaintiff and the defendant's counsel's clerk not disclose the material facts outlined above, but parts of the affidavit were misleading, such as categorizing the relationship as an intimate one and that the defendant was an escort without indicating she has not worked as such since the plaintiff was taking care of her. Such statements were not fulsome in the sense of providing the court with a fair and balanced perception of the true nature of the relationship between the parties.

[45] I have no doubt that the material facts outlined above that were not disclosed by the plaintiff not only might have but would have had an impact on my decision to grant the CPL.

- [46] Accordingly, I find that the plaintiff has failed to live up to his obligation to provide full, frank and fair disclosure of material facts on his *ex parte* motion seeking a CPL.
- [47] Notwithstanding my finding that the plaintiff has breached his positive duty to disclose, the plaintiff seeks an order that the defendant still provide security. The plaintiff directs the court to section 103(6)(b) of the *Courts of Justice Act* which permits the court to issue another form of security. The plaintiff also directs the court to the decision of André J. in *Choksi v. Peerani*.¹¹
- [48] The facts of *Choksi* are that the plaintiff arranged with the defendants to purchase three acres of property and sent the one of the defendants, Muhammad Iqbal Peerani, \$602,332.33 to purchase the property called Port Qasim Authority in Pakistan. The plaintiff later discovered that the defendant Peerani did not use all the money advanced and used \$487,332.33 to buy property in Mississauga which he transferred to his sons, for no consideration, after learning that the plaintiff intended to sue him.
- [49] André J. found material non-disclosure in that the moving party did not disclose that he received a letter from the Port Qasim Authority that the plaintiff only purchased a leasehold interest in the three acre property for a price of \$125,000. Having found material non-disclosure, André J, discharged the CPL but granted another form of security in favour of the plaintiff; that is, he found the plaintiff has an interest in the Mississauga property and ordered security be paid into court in the amount of \$250,000.
- [50] The plaintiff in his action argues that the facts here are similar and that I should grant another form of security that the plaintiff pay half the net equity in the property once it is sold into court.
- [51] I reject this submission of the plaintiff.
- [52] First, the facts are not similar. The relationship between the plaintiff and the defendant in this action are substantially different than the relationship between the plaintiff and the defendant in *Choski*.
- [53] Further, I am of the view that once it has been determined that the moving party has not complied with its legal obligation to provide full, frank and fair disclosure, alternative security should only be considered where there exists special circumstances that persuade the court to exercise the discretion to grant another form of security. I echo the statement of Sharpe J. on the consequences if the court does not strictly uphold that duty imposed by the law of full, frank and fair disclosure.
- [54] In addition, in the circumstances of this case, the magnitude of non-disclosure of the plaintiff is significant. The plaintiff did not provide, at all, a fair and balanced description

¹¹ 2013 ONSC 5687

of the nature of the relationship between him and the defendant. Nor did he provide the position of the defendant which the plaintiff knew prior to filing his motion for a CPL.

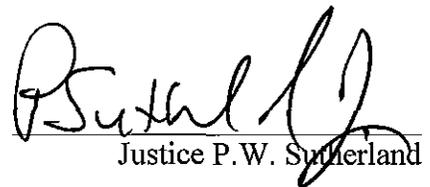
- [55] Unlike in *Choski*, the defendant took no steps to transfer the property out of her name even though she had ample opportunity to do so. There is no action of the defendant that would compel the court to grant alternate security.
- [56] I also have concerns on the plaintiff delaying his communicating with the defendant's counsel concerning the settlement proposal and the contents of the letter dated February 2, 2018 and instead preparing and filing his *ex parte* motion for a CPL.
- [57] Thus, I do not find this is one of those cases with special circumstances that persuade the court to exercise its discretion to order another form of security in favour of the plaintiff.
- [58] In conclusion, I find that the plaintiff has not satisfied that duty imposed to provide full, frank and fair disclosure of material facts to me, the motion judge, on the *ex parte* CPL motion. The CPL must be discharged.

Disposition

- [59] As indicated in my endorsement dated October 16, 2018, I order the following:
- (a) The certificate of pending litigation registered as instrument number YR2819854 against the land and premises, municipally known as 58 William Bartlett Drive, Markham, Ontario, more particularly described as Lot 40, Plan 65M4325; subject to an easement for entry in the Land Registry Office for the Regional Municipality of York (No. 65), PIN 7001-0116 LT, is hereby discharged.
 - (b) The motion of the plaintiff is dismissed.

Costs

If the parties cannot agree on costs of this motion, the Defendant to serve and file her submissions on costs within 21 days from the date of this decision, and the Plaintiff will have 14 days thereafter to serve and file his submissions. The submissions to be no more than three pages, double spaced, exclusive of any bill of costs, case law and offers to settle. Submissions are to be filed with the court. If no submissions are received within the time period set out herein, an order will be made that there will be no costs.


Justice P.W. Sutherland

Amendments

Paragraph [8] has been amended from its original text: The defendant deposed in her affidavit in support of her motion, that the relationship was one of fee for service.

Notwithstanding that both parties agree that there was no sexual component to their relationship, for a period of approximately 4-5 years, the plaintiff did pay substantial monies to the defendant along with purchasing a luxury vehicle, a Porsche Cayenne. The plaintiff estimates the amount of monies paid to the defendant through bank transfers, cheques and credit card charges to be approximately \$500,000.

To new Paragraph [8]: The parties met in 2007. The defendant deposed in her affidavit in support of her motion, that the relationship was one of fee for service. Notwithstanding that both parties agree that there was no sexual intercourse, the plaintiff did pay substantial monies to the defendant along with purchasing a luxury vehicle, a Porsche Panamera. The plaintiff estimates the amount of monies paid to the defendant through bank transfers, cheques and credit card charges to be approximately \$500,000.

Paragraph [9] is amended as follows:

Fourth line: "The defendant deposes that..." is deleted and replaced with "The plaintiff deposes that..."

Paragraph [13] is amended as follows:

First sentence: "... met in 2012" is deleted and replaced with "... met in 2007".

Second sentence: "around October 2016" is deleted and replaced with "around May 2017".

Paragraphs [16] to [27] are amended as follows:

The year "2017" listed in these paragraphs is deleted and replaced with "2018".

Paragraph [40] is amended as follows:

First line: "... failed to disclosure ..." is deleted and replaced with "... failed to disclose ...".

Paragraph [41](e) is amended as follows:

First line: "The plaintiff stopped working ..." is deleted and replaced with "The defendant stopped working ...".

Paragraph [41](f) is amended as follows:

First line: "... sexual relations." is deleted and replaced with "... sexual intercourse.".

Paragraph [44] is amended as follows:

First/second lines: "... the plaintiff and the defendant's counsel's clerk ..." is deleted and replaced with "... the plaintiff and the plaintiff's counsel's clerk ...".

Paragraph [48] is amended as follows:

Second line: "... and sent the one of the defendants, ..." is deleted and replaced with "... and sent one of the defendants, ...".