

COURT OF APPEAL FOR ONTARIO

CITATION: Djekic v. Zai, 2015 ONCA 25

DATE: 20150120

DOCKET: C58542

Weiler, Sharpe and Blair JJ.A.

BETWEEN

Barb Bosiljka Djekic

Applicant

(Appellant and Respondent on the Cross-Appeal)

and

William Zai

Respondent

(Respondent and Appellant on the Cross-Appeal)

Steven J. Lubczuk and Kathleen E. Quinlan, for the appellant and respondent on the cross-appeal

William Zai, acting in person

Heard: January 8, 2015

On appeal from the judgment of Justice Robert D. Reilly of the Superior Court of Justice, dated February 27, 2014.

By the Court:

Overview

[1] Ms. Djekic and Mr. Zai cohabited for almost eight years but did not marry.

They separated in May 2012.

[2] Ms. Djekic asserted a claim for support and for a constructive trust in the home in which the parties resided (18 Drumoak Place, Kitchener, Ontario). Mr. Zai opposed and asserted his own claims for a reconciliation of amounts he says he paid on behalf of Ms. Djekic in relation to certain lines of credit they had taken out in connection with a number of real estate investments in which they were jointly involved. He also claimed certain other adjustments.

[3] Ms. Djekic and Mr. Zai are both over 60 years of age. He is a pharmacist, no longer working full time. She is and has been unemployed, and receives CPP disability benefits and some income as a result of an award from the Workers Safety Insurance Board, totalling \$1900 per month.

[4] The trial judge ordered Mr. Zai to pay Ms. Djekic spousal support in the amount of \$950 per month for a limited period of six years, commencing March 1, 2014. He also ordered that she was entitled to an equitable trust interest in the Drumoak residence valued in the amount of \$100,000. Mr. Zai was given until March 1, 2015 to make that payment and in the event of his failure to do so, Ms. Djekic would be entitled to register her \$100,000 interest against title. No pre-judgment interest was granted. In addition, the trial judge awarded costs in favour of Ms. Djekic in the amount of \$18,500.

[5] Ms. Djekic appeals from the order. She submits that the trial judge erred in granting support on a time-limited basis (she does not contest the amount) and in

failing to order that she had a constructive trust interest equivalent to one-half of the value of the Drumoak property at the time of trial (estimates of that value varied from \$600,000 to about \$750,000). She also contends that the trial judge erred in failing to provide security for the payment of her equitable interest and in failing to grant pre-judgment interest.

[6] Mr. Zai opposes these claims and cross-appeals with respect to the quantum of support, the order of costs, and the trial judge's failure to deal with his claims about the monies owing to him and Ms. Djekic's failure to return certain personal property to him.

Discussion

Support

[7] The quantum of support awarded by the trial judge -- \$950 per month -- was amply supported in the evidence. There is no basis for interfering with the trial judge's decision in that regard.

[8] In our view, however, the trial judge erred in determining that the spousal support award should be time limited to a period of six years. Although he considered the length of the parties' cohabitation -- concluding it was on the cusp between a short-term and a medium-term relationship -- he failed to address other important factors relating to this issue.

[9] The *Spousal Support Advisory Guidelines* suggest that where the recipient's age plus the duration of the relationship are greater than 65 – as is the case with Ms. Djekic – an indefinite award is appropriate. In *Fisher v. Fisher* (2008), 88 O.R. (3d) 241 (C.A.), this Court noted that, while a judge may depart from the *Guidelines*, he or she should provide reasons for doing so. Here, the trial judge did not. In addition, he does not appear to have considered Ms. Djekic's age at all in this context, or the fact that she is disabled and on a small pension. Mr. Zai, on the other hand – while he says he is not a wealthy man – has, or through his business corporation has access to, an income in the neighbourhood of \$90,000 per year according to the records filed. Although he may not maintain this earning capability for many years, the nature of an indeterminate award is that it is not necessarily permanent as it may be subject to variation, in light of appropriate changes in circumstances.

[10] We would therefore vary the trial judge's spousal support award to provide for a monthly payment of \$950 on an indeterminate basis, payable in accordance with the *Guidelines*. We reject the argument that the award should be retroactive to the date of separation; no claim for interim relief was made and it appears that Mr. Zai was providing for Ms. Djekic up to the time of trial when they both continued to live in the same premises at 18 Drumoak Place.

The Constructive Trust Claim

[11] Ms. Djekic claimed an interest in 18 Drumoak Place based on: (i) monetary contributions that she says she made to the down payment on its purchase (\$80,000); (ii) monetary contributions she says she made to the reduction of the mortgage (no crystallized amount); and (iii) contributions she says she made to the upkeep and improvement of the premises and other household chores she did. Mr. Zai says that the \$80,000 was a loan, evidenced by a promissory note, and that he repaid the loan. Although he acknowledges that approximately \$47,000 of Ms. Djekic's funds were contributed to pay down the Drumoak mortgage, Mr. Zai claims that it was he who otherwise made all the mortgage payments on the home as well as all payments for taxes, utilities, repairs, general upkeep and food. In addition, he asserts that he made payments totalling about \$101,000 to reduce the parties' joint liabilities on letters of credit taken out to finance their joint acquisition of other properties. He claims half of this amount from Ms. Djekic as her share.

[12] The trial judge found that Ms. Djekic had met the test for a finding of constructive trust based on unjust enrichment: Mr. Zia had benefitted from an enrichment, to Ms. Djekic's detriment, and there was no juridical reason for the enrichment: *Peter v. Beblow*, [1993] 1 S.C.R. 980. Without much explanation, he fixed the value of Ms. Djekic's equitable interest at \$110,000.

[13] Ms. Djekic submits that the trial judge erred by failing to hold that the parties were engaged in a “joint family venture”, and therefore that her interest should have been determined on the “value survived” approach, i.e., on the basis of one-half of the value of the equity in the Drumoak property at the time of trial: *Kerr v. Baranow*, [2011] 1 S.C.R. 269. She says that the finding of a joint family venture is justified by the existence of the four requisite factors: (i) mutual effort; (ii) economic integration; (iii) actual interest; and (iv) priority of the family. One difficulty with this submission is that the case was not put to the trial judge in this way: counsel for Ms. Djekic acknowledges that *Kerr v. Baranow* was not argued. Another is that there is no way on the state of the record to sort out the application of those factors to the circumstances.

[14] The trial judge was confronted with an unsatisfactory record. There was no valid appraisal as to the value of the Drumoak property at the time of trial. The parties’ financial affairs and relationship were complicated because they had jointly purchased five other residential properties, funded through lines of credit and, at least partly, through the proceeds from the sale of the respective homes in which each of them lived prior to establishing their conjugal relationship. While Mr. Zai is able to point to certain payments that he made at various times in various accounts, and while it appears that Ms. Djekic did receive at least the sums of \$56,000 and \$47,955 from him, the banking records filed do not indicate what happened to these proceeds and to what use they were put is unclear. The

trial judge did not make any finding about whether the initial \$80,000 contribution was a loan or a contribution to the purchase price. He concluded, however, that Ms. Djekic had been repaid the amount in one fashion or another but that the monies “went back into the property or properties” and that it was not possible to sort out what happened to the monies or what cheques went where. He made this observation:

Drumoak was purchased, and I will use round figures, for some \$444,000 at that time [i.e., when the parties began to cohabit]. Part of it was a contribution which may well have been a loan but unquestionably was given to [Mr. Zai] to permit the purchase of Drumoak. There may have been repayment of some or all of that sum. It may have gone back into the mortgage on the property. *I say again, any attempt on my part to untangle the financial circumstances between [the parties] over the period of [their] cohabitation is effectively fruitless ...* [Emphasis added]

[15] In all the circumstances, taking into account Ms. Djekic’s other contributions to the Drumoak property as well, he concluded that an order for compensation for her equitable trust interest in the home was the appropriate way to proceed, and he fixed the value of that interest at \$100,000.

[16] At the end of the day, the trial judge did the best he could based on the record before him, and reached a result that was fair and reasonable, in our opinion, taking into account the submissions of the parties and all of the circumstances. We would not interfere with his finding of an equitable trust interest or with his quantification of the value of that interest.

[17] We agree with counsel, however, that Ms. Djekic should be entitled to pre-judgment interest on her award of \$100,000 at the rate set out in the *Courts of Justice Act*, from the date of separation which we fix as May 1, 2012 and to post-judgment interest.

[18] In addition, since Mr. Zai retains title to and ownership of the Drumoak property and controls its potential disposition, we agree that Ms. Djekic is entitled to have a charge on the property to secure payment of the \$100,000 plus interest. Mr. Zai was ordered to make that payment by March 1, 2015 (roughly one year after the judgment). In the circumstances – given the time taken for the hearing of the appeal and the cross-appeal, and the fact that her interest is to be secured against the property – we extend the time for payment for a further three months, to May 31, 2015.

[19] The appeal of Ms. Djekic is otherwise dismissed.

[20] Mr. Zai's cross-appeal is dismissed as well.

[21] The trial judge indicated during the course of his oral reasons that he would deal with Mr. Zai's claim for a reconciliation of the monies he says he had paid on behalf of Ms. Djekic, including payments made on the income properties held in their joint names. He never did so specifically, however. Nonetheless, a review of his reasons as a whole indicates that he was alive to the competing financial claims as between the parties, and we are satisfied that his order fixing

the value of Ms. Djekic's equitable interest in the Drumoak property at \$100,000 fairly takes all of these factors into account

[22] Mr. Zai's other complaint on the cross-appeal relates to the trial judge's award of costs of the proceedings to Ms. Djekic in the amount of \$18,500. He contests the trial judge's conclusion that she was more successful than he.

[23] Costs are in the discretion of the trial judge, both as to quantum and as to who is to pay. Mr. Zai opposed any payment of support and any award of an equitable interest. Ms. Djekic succeeded on both counts. While Mr. Zai did enjoy some success on the issues at trial, we see no basis for interfering with the trial judge's decision as to costs.

Disposition

[24] For the foregoing reasons, the appeal is allowed to the following extent:

(i) Paragraph 2 of the order of Reilly J. dated February 27, 2014 is deleted and replaced with the following:

The Respondent, William Zai, shall pay spousal support to the Applicant, Barb Bosiljka Djekic, the sum of \$950 per month, payable in accordance with the *Spousal Support Advisory Guidelines*;

(ii) Paragraph 4 of the order is deleted and replaced with the following:

4(a) The Applicant, Barb Bosiljka Djekic, shall be entitled to an equitable trust interest in the property located at 18 Drumoak Place, Kitchener, Ontario, fixed in the amount of \$100,000, plus pre-judgment

interest on that amount at the rate set out in the *Courts of Justice Act* from the date of separation, May 1, 2012, and post-judgment interest from February 27, 2014 as set out therein. The Applicant is further entitled to a charge against the property as security for the payment of this obligation.

(b) The Respondent, William Zai, shall pay the sum of \$100,000 plus interest, in satisfaction of this obligation, on or before May 31, 2015. Upon payment of the same, any charge that may have been registered as security for payment shall be discharged, and the Applicant, Barb Bosiljka Djekic, shall thereafter have no further claim to the premises at 18 Drumoak Place, Kitchener, Ontario.

[25] The appeal is otherwise dismissed.

[26] The cross-appeal is dismissed.

[27] Ms. Djekic is entitled to her costs of the appeal, fixed in the amount of \$9,500 inclusive of all applicable taxes and disbursements.

Released: "K.M.W." January 20, 2015

"K.M. Weiler J.A."
"Robert J. Sharpe J.A."
"R.A. Blair J.A."