

COURT OF APPEAL FOR ONTARIO

CITATION: Arbuckle v. Arbuckle, 2023 ONCA 80

DATE: 20230207

DOCKET: COA-22-CV-0171

Huscroft, Miller and Nordheimer JJ.A.

BETWEEN

Krista Elizabeth Arbuckle

Applicant (Respondent)

and

John David Arbuckle

Respondent (Appellant)

Gary Joseph and Julia McArthur, for the appellant

George Karahotzitis and Camelia Amiri, for the respondent

Heard: February 1, 2023

On appeal from the order of Justice Gordon D. Lemon of the Superior Court of Justice, dated August 18, 2022, with reasons reported at 2022 ONSC 4769.

REASONS FOR DECISION

[1] The appellant argues that the motion judge made several errors in finding that a settlement was reached in mediation with Mr. Herschel Fogelman and granting partial summary judgment.

[2] We do not agree.

[3] Following an initial unsuccessful motion for summary judgment brought by the appellant to enforce a prior separation agreement, a mediation was held with Mr. Fogelman on May 2, 2019. It was common ground that there were no minutes, memoranda of agreement, or any other written confirmation of the terms of an agreement. The motion judge carefully reviewed the record and found substantial evidence proving that a settlement agreement was reached. This included the evidence of Mr. Fogelman that an agreement was reached, along with others present at the mediation. The motion judge found that the appellant was not credible, and rejected his evidence when it was in conflict with other evidence. We are not persuaded that the motion judge failed to address any significant inconsistencies and see no error in his conclusion that an agreement was reached.

[4] There is no merit to the argument that the settlement was simply an agreement to agree. Nor can it be said that the terms of the agreement reached were not sufficiently clear or complete to constitute an agreement. Further, we do not accept that the respondent's post-mediation conduct demonstrated that there was no agreement. This argument was considered and rejected by the motion judge, who found that it was reasonable for the respondent not to take any steps until the agreement was prepared by the appellant's lawyer, given the closing date was set for the end of June 2019.

[5] We are not persuaded that it was inappropriate for the motion judge to draw an adverse inference from the failure of the appellant to adduce full evidence from his lawyer, who was present throughout the mediation, given that she had provided some evidence through answers in response to undertakings. But in any event, the motion judge did not find that the appellant failed for this reason alone. He found that the appellant failed because he had not “put his best foot forward” on the summary judgment motion: the appellant did not call his financial adviser and his evidence about the end of the mediation was contrary to the evidence of all of the other witnesses in attendance.

[6] Finally, we do not accept that the motion judge failed to consider whether partial summary judgment was appropriate. The motion judge’s decision is consistent with the purpose of the *Family Law Rules*, O. Reg. 114/99. The motion judge found that little was left to be litigated but specifically instructed the parties to apprise him of any outstanding issues, which he said he would trial manage. Counsel advised that he has since met with the parties in this regard and remains seized of the matter.

[7] In summary, the appellant is simply seeking to relitigate the summary judgment motion. He is not entitled to do so. He has failed to establish either a palpable and overriding error or an error in principle that would permit this court to intervene on appeal.

[8] The appeal is dismissed. The respondent is entitled to costs in the agreed amount of \$20,000, all inclusive.

“Grant Huscroft J.A.”
“B.W. Miller J.A.”
“I.V.B. Nordheimer J.A.”