COURT FILE NO.: 181/17 (Orangeville)
DATE: 2019 06 13

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kelly Williams, Plaintiff

AND:

James (Jimmy) Ostapchuk, Defendant

BEFORE: SEPPI J.

COUNSEL: Bikram Singh Bal, for the Plaintiff
Fraser Chorley, for the Defendant

HEARD: May 13, 2019

ENDORSEMENT

[1] The Plaintiff, Kelly Williams, and Defendant, James Ostapchuk, cohabited for about three years. Mr. Ostapchuk moved into the house which was owned by Ms. Williams in December 2013. They separated in February 2017. The issue on this motion is whether the Minutes of Settlement entered into by the parties on June 4, 2018 in this action should be enforced or set aside.

[2] In October 2017, Ms. Williams commenced this action seeking damages of $68,418 to reimburse her for items and monies she alleges had been paid by her for the Defendant's benefit, including a claim for punitive damages of $10,000 for his "deliberate and fraudulent actions." She also sought leave to sell various items which she claimed had been left behind on her property by the Defendant when he moved out.

[3] Mr. Ostapchuk defended the action and filed a counterclaim for damages in the amount of $400,000 as the value of what he claims are significant improvements he made to the Plaintiff's house while he lived there. The Defendant claims he is a contractor with experience in home building and that the work and materials he contributed while living there provided both financial and quality of life value to the Plaintiff.

[4] The Plaintiff denies the claim. She indicates the Defendant resided in her home rent free while she paid the household bills and supplies for home improvements. She admits he did work on the house while he was there, but notes that she too provided work and gifts to him during the relationship.

[5] On June 4, 2018, the parties with their lawyers attended at a settlement meeting where Minutes of Settlement were signed. The Minutes purport to settle all the issues in this action. They provide for the retrieval and transfer of certain items of personal property to the Defendant and payment of $70,000 by the Plaintiff to the Defendant.

[6] Following this meeting and the execution of the Minutes of Settlement, counsel for the Defendant contacted Plaintiff's counsel seeking to have his client attend at property to retrieve the items listed in the Minutes. He followed up this request by sending a Full and Final Release, an Order to Dismiss, a Motion to Dismiss and Consent to the Plaintiff's lawyer. There followed some back and forth

communication between the lawyers with the Defendant pressing for dates on which he could attend to remove his property, and the Plaintiff's lawyer's responses of reluctance to these requests.

[7] On June 12, 2018, the Plaintiff's lawyer emailed a letter to the Defendant's lawyer revoking the Minutes of Settlement. The letter states the settlement was made under duress and claims the outcome is unconscionable. The Defendant's position then and now is that the parties entered into a valid and enforceable settlement, that both parties were represented by counsel during the negotiation process and there are no grounds upon which the Minutes ought to be set aside.

[8] Ultimately, when it was obvious the Plaintiff was holding to her position that the settlement was made under duress and unconscionable, the Defendant brought this motion for the enforcement of the Minutes of Settlement.

[9] The Plaintiff brought a cross-motion for an order to set aside the Minutes of Settlement on the grounds that the Minutes were entered into by the Plaintiff "due to undue influence, duress and/or illegitimate pressure," and that "the Minutes amount to an unconscionable transaction."

Positions of the Parties

[10] The Defendant's position is that the Court's discretion not to enforce a settlement is to be exercised rarely, as directed by the Ontario Court of Appeal in *Srebot v. Srebot Farms* Ltd., 2013 ONCA 84. He submits this is not one of those

rare circumstances. While the Defendant has not denied the Plaintiff's evidence regarding his conduct during their relationship, he submits that conduct or events prior to the settlement meeting are not relevant to the determination of enforceability. He submits the terms were fairly negotiated with each party having independent legal advice without any intimidation or undue influence on his part during the process.

[11] The Plaintiff claims it would be an injustice to enforce these Minutes of Settlement in circumstances where the terms result in an unconscionable transaction, only entered into by her under psychological pressure arising from the intimidation tactics of the Defendant during their cohabitation. She submits that as a result of the history of the Defendant's controlling behaviour, of her vulnerabilities known to and manipulated by him, and of her habitual submission to his domination, her mind was unable to properly focus or process what took place at the settlement meeting. She said she succumbed to the resultant psychological pressure and the Defendant's threats of aggressive and endless litigation if she did not agree to his terms. She says she believed she had no alternative but to sign the Minutes, which were typed by his lawyer and presented to her at the end of a long day.

Analysis

[12] There is no dispute a settlement was entered into by the parties on June 4, 2018. It is also not disputed that only rarely ought the court exercise its discretion

to set aside Minutes of Settlement. As stated at paragraph 6 in the Ontario Court of Appeal decision in *Srebot* (*supra)*, the discretionary decision not to enforce a concluded settlement "should be reserved for those rare cases where compelling circumstances establish that the enforcement of the settlement is not in the interests of justice."

[13] In the trial decision of *Srebot*, reported at [2011] O.J. No. 3480, upheld in the Court of Appeal, Justice Chapnick at paragraphs 72 to 73, referencing prior authorities, notes that "the relevant jurisprudence holds that a court retains the discretion to not enforce a settlement that is unreasonable, that in its view would be unfair, would result in injustice, or where there is some other good reason for the court to exercise its discretion not to enforce it."

[14] From paragraph 21 of the decision of *Milios v. Zagas*, (1998), 38 O.R. (3d) 218 (C.A.) Justice Chapnick lists the four factors to be considered in the exercise of this discretion as,

a) Whether an order had been taken out or the parties' pre-settlement positions remained intact;

b) Whether the Defendant would be prejudiced if the settlement was not enforced, apart from losing the benefit of the settlement;

c) The degree to which the Plaintiff would be prejudiced if judgment was granted in relation to the prejudice the Defendant would suffer; and

d) Whether third parties are affected if the settlement is not enforced.

[15] In the case at bar, firstly, no order was taken out nor have any of the terms of the Minutes being acted upon by the parties. Within days, the Plaintiff's counsel gave notice to the Defendant's counsel that she was revoking the settlement as unconscionable and as having been entered into by her under duress.

[16] Secondly, there is no prejudice to the Defendant, apart from losing the benefit of the settlement, if the settlement is not enforced. The parties would be in the same position in their litigation as they were in before.

[17] Thirdly, and on the other hand, if judgment is granted in accordance with the Minutes of Settlement, the Plaintiff's prejudice would be significant. It would require a substantial payment from her to the Defendant together with delivery of items, many of which she claims to be items bought or gifted for her use. The extent of this potential prejudice is objectively viewed in the context of the pleadings in this action, which she commenced to recover what she claims is owing to her from the Defendant. The Plaintiff's belief, as she deposes, that the Defendant's counterclaim was commenced as a tactic to intimidate her into an unfair submission, against her own fair and just claim, is bolstered by the fact that the Defendant did not provide any evidence of his claims until just before the settlement meeting. Even then all he produced were unorganized emails, including an invoice dated April 25, 2018, never before received by the Plaintiff, for

improvements allegedly made in 2009. Despite his counsel's demand of an Affidavit of Documents from the parties, which the Plaintiff provided in preparation for the settlement meeting, the Defendant never provided an Affidavit of Documents to support his claim. The Plaintiff's prejudice is compounded by having never received such Affidavit evidence in support of his claim.

[18] Regarding the fourth factor to be considered, there are no third parties affected if the settlement is not enforced.

[19] The Plaintiff deposes to numerous facts, not denied by the Defendant, of intimidation and unfettered domination exerted over the Plaintiff in the context and duration of their relationship. To the date of the meeting, the Defendant continued to engage in intimidating conduct towards her, which appears to have been calculated to weaken the Plaintiff's resolve. This is evidenced by his driving by the Plaintiff's house the night before the meeting, which she found to be particularly frightening. Knowing her vulnerabilities, this would have been a deliberate manoeuvre on the Defendant's part to gain an advantage, given that he lived an hour away from her home in a rural area.

[20] Despite the fact the Plaintiff had a lawyer present with her at the meeting, it is apparent she was unable to fully appreciate or evaluate the advice she was given. She tells of her lawyer's advice not to continue with the negotiation during the meeting due to perceived bullying and intimidating negotiation tactics, which

was advice she did not heed. She says, "but I was in shock. I was not myself, I was not thinking, and I was not processing what she [the lawyer] was telling me."

[21] There is no logic to the negotiating process that took place: the Defendant opening with an offer of $30,000 to be paid by the Plaintiff; the Plaintiff countering with $15,000, which she says she offered "just to make things end," even though she was initially stunned he would offer her nothing and instead wanted her to pay him. The negotiations continued without any relationship to the action: the Defendant withdrawing his $30,000 offer and suddenly demanding $150,000 from the Plaintiff to settle; the Plaintiff increasing her offer to $30,000, "just to try to get out of this mess." She deposes that she was "in fear" due to the Defendant's history of previous litigation that he had dragged on for years with other partners.

[22] The Plaintiff states:

> 79. "I verily believed that I had no other option but to submit to the Defendant's demands and settle the case that day. My will was overborne by the Defendant and I was induced, coerced and intimidated by him. The Defendant and I dated for a long time – he knew how to exert his dominance over me and make me vulnerable to extract a favourable result for himself.
>
> 80. Out of desperation, after having been in negotiations for over four hours at that time and not having eaten all day, I succumbed to my fears and countered with $70,000, the amount in the Minutes."

[23] In all the circumstances, this was not a fair settlement, which requires a meeting of two minds that are fully engaged and free of coercion and intimidation. Without any supporting evidence from the Defendant of his counterclaim being

provided to the Plaintiff before she agreed to the settlement, it is a logical inference that the settlement is not one that is just and reasonable in relation to the issues in this action. Considering all the relevant and compelling circumstances disclosed by the evidence, including the high level of emotional distress experienced by the Plaintiff in this process as a result of the Defendant's dominance over her, and the absence of evidence to show a measure of reasonableness in the terms, enforcing this settlement is not in the interests of justice.

Result

[24] The Defendant's motion is dismissed.

[25] The Minutes of Settlement, dated June 4, 2018, are set aside and the action will continue as if there had been no settlement.

[26] The Plaintiff has been wholly successful on this motion and is entitled to costs. Based on a review of the Plaintiff's bill of costs filed, partial indemnity costs are awarded to her, fixed at $6,600, payable by the Defendant in 30 days.

SEPPI J.

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BETWEEN:

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ENDORSEMENT

SEPPI J.

Released: June 13, 2019