

Court of Queen's Bench of Alberta

Citation: Toliver v. Koepke, 2008 ABQB 37

Date: 20080115
Docket: 4803 132898
Registry: Edmonton

Between:

Rachelle Ann Toliver

Plaintiff

- and -

Murray Elwood Koepke

Defendant

**Oral Reasons for Judgment
of the
Honourable Mr. Justice Eric F. Macklin**

[1] The parties attended a settlement meeting on April 6, 2006 in an attempt to resolve outstanding issues arising out of their intended divorce. The Plaintiff says that a settlement agreement was reached at the meeting but the Defendant says there was no agreement. A trial of the issue as to whether a settlement agreement was reached has been directed.

[2] Counsel for the Defendant Applicant is not the same counsel that appeared at the settlement meeting. The Applicant applies for an order removing counsel for the Plaintiff Respondent as counsel of record for the Plaintiff as he is the same counsel that appeared at the settlement meeting and will be a witness at the trial of the issue.

[3] The Respondent submits that the "primary issue" to be resolved between the parties relates to the division of matrimonial property and corollary relief. This includes issues relating

to the quantum of spousal and child support. The Respondent submits that the question of whether a settlement agreement was reached regarding the distribution of matrimonial property and corollary relief is a secondary issue, the trial of which may not be necessary.

[4] In an application heard on September 13, 2007, Justice Moreau directed that there be a trial of the issue over whether there was a settlement agreement concluded between the parties. On January 9, 2008 counsel for the Plaintiff Respondent filed a Notice of Motion for an application to vary the order of September 13, 2007 so as to enter the “primary issue” for trial. That is, the Respondent now applies to have the issues relating to the matrimonial property and corollary relief tried before or at the same time as the issue over the existence of a settlement agreement.

[5] In my view, this is an inappropriate application by the Plaintiff. The order was granted by Justice Moreau directing that the trial of the issue over the settlement agreement be heard. While certain terms of her order could not be complied with (such as setting the trial dates within 30 days of the application being heard or the conducting of examinations on affidavits within 30 days), the failure to comply with these terms resulted not from any fault of the Defendant but rather because of the perceived need by the Defendant to bring the application to have counsel for the Plaintiff removed, an application that the Defendant *bona fide* believes necessary and which is being vehemently opposed by the Plaintiff.

[6] The order of Justice Moreau cannot be circumvented by an application to have other issues heard before or at the same time as the issue she directed be tried. If the Plaintiff elects to abandon her argument that a settlement agreement was reached, and therefore make the trial of the issue directed by Justice Moreau unnecessary, then that is a different matter. If the Plaintiff does abandon the argument that a settlement agreement was reached, then the parties can simply proceed to trial on the issues of division of matrimonial property and corollary relief as the Defendant says they should do in any event.

[7] As the Plaintiff has not abandoned her argument that a settlement agreement was reached, it is necessary to deal with the application by the Defendant that counsel for the Plaintiff should be removed.

[8] Chapter 10, Rule 10 of the *Code of Professional Conduct of the Law Society of Alberta* provides that:

A lawyer must not act as counsel in any proceeding in which it is likely that the lawyer will give evidence that will be contested.

[9] Commentary 10 to this Rule provides that:

A lawyer’s objectivity and the impartiality of a proceeding will be called into question if the lawyer combines the roles of advocate and witness.

[10] In *Forward v. Zurich Insurance Co.* [2002] A.J. No. 664 (Alta. C.A.) Berger J.A. stated that codes of ethics are not binding on the court but are important statements of public policy. Justice Berger agreed with the submission that removing solicitors prior to trial on the basis of a mere possibility that counsel may give evidence is insufficient and confirmed that it must be established that the counsel is a likely witness.

[11] Counsel for the Plaintiff points to a statement made by the Defendant that a settlement was reached and therefore, with this admission, there will be no need for him to testify. However, this is not all that was said by the Defendant. While he did say that he agreed to settlement terms, they were on the condition “that the settlement agreement would be written up and paid out the next day, Friday, April 7, 2006, and, if not, then we would proceed to trial.” He then deposes in his affidavit of September 11, 2007 that funds were not sent to him the next day, or the day after that. Accordingly, the Defendant says any agreement was rendered void. Indeed, counsel for the Plaintiff has acknowledged that the settlement funds of \$127,000 were never tendered and it is now 21 months after the supposed agreement was reached.

[12] In his brief, counsel for the Plaintiff acknowledges that he made a statement during the course of the settlement meeting indicating that the Defendant could receive his payment of the settlement monies “tomorrow” if the matter were settled on April 6, 2006. In the Plaintiff’s brief, it is submitted that “this statement was a figure of speech, not a contractual term, given that such a tight schedule was clearly impossible”.

[13] Counsel for the Plaintiff also say that, although the terms of the alleged Agreement were never written, there is no dispute as to any of them with the exception of the one requiring monies to be paid the next day. He relies again on a statement to that effect by the Defendant before Justice Slatter. There is nothing, however, in any of the transcripts of court proceedings or affidavits that I have been referred to as to precisely what the other terms of the agreement were and there would have to be a number of them as they supposedly dealt with issues of matrimonial property as well as child and spousal support.

[14] While the parties themselves will obviously have to give evidence at trial as to the terms agreed upon, there can be no doubt that the lawyers present at the settlement meeting will also have to give such evidence. Surely the Plaintiff is entitled to have, and would desire to have, her own lawyer who was present at the meeting give evidence and produce notes, if he has any, supporting her position. I also pause to emphasize as well that the Defendant says that the terms of the alleged agreement are disputed and, as they were not written down in a formal settlement agreement, it is entirely possible that the parties believe the terms were agreed upon but have markedly different understandings of those terms. Again, this only goes to establish the likely necessity of counsel for the two parties testifying at the trial.

[15] To summarize, in a trial to determine whether a settlement agreement was reached and what its terms were, the people present at the settlement meeting will likely be required to testify. Those include the parties. However, the objectivity (or lack thereof) of the parties themselves makes the supporting evidence of other individuals present at the settlement meeting more

relevant and crucial to their respective positions. I have no hesitation in finding that the *viva voce* evidence of counsel for both parties who attended the meeting will likely be necessary at the trial of the issue over whether a settlement agreement was reached and, if so, its terms.

[16] In the case of counsel for the Plaintiff, this is especially so given his explanation of the statement made during the settlement meeting which would require his explanation or qualification at trial. He is the only one that can give the evidence that the statement was intended as “a figure of speech, not a contractual term”. While he believes his cross-examination of the Defendant will elicit this evidence, and make his testimony on it unnecessary, I do not accept that as being in the client’s best interests or an appropriate risk to take on her behalf. I would be surprised if independent counsel for the Plaintiff would agree that she would be best served if her lawyer at the meeting did not testify on her behalf.

[17] It should be noted that counsel for the Plaintiff even acknowledged a potential problem in his continuing to act on behalf of the Plaintiff when he appeared before Justice Slatter on September 15, 2006. The following exchange took place:

THE COURT: And again you should reflect on your own situation here,
Mr. King.

MR. KING: Thank you, My Lord. I appreciate the advice and I will
advise my client accordingly. There’s lots of other competent counsel who
can fill my shoes.

THE COURT: Yes, and once you get things going here maybe it will .. it
will resolve itself, but ..

MR. KING: Yes.

THE COURT: Okay.

MR. KING: I’ll take your advice as direction not to appear on this
matter again and that will probably solve some –

THE COURT: Well, in this stuff, to get it – to get it going forward I think
you’re suited for it because you know the history, but if it looks like it is
going to go to trial, that’s when you have to reflect on your situation.

MR. KING: I’ll have to step aside. I appreciate that, sir.

[18] It now looks like the matter is “going to go to trial” and, as stated by counsel for the Plaintiff to Justice Slatter, he will “have to step aside.”

[19] While a court is always reluctant to deny a party his or her choice of counsel, the court must also protect the integrity of the system and do everything possible to prevent a possible delay of the trial or a mistrial caused by counsel remaining on a file beyond the time when it is apparent that that counsel will be required to testify. Further, a delay in doing what will ultimately be required in any event may result in longer delays and inconvenience to the parties and the court closer to the date of trial.

[20] Finally, and importantly, counsel acting for a party at trial should have every opportunity to determine the tactics he or she will use throughout the proceeding to best advance the party's position. The tactics he or she might consider important should not be compromised by the current lawyer's own assessment of appropriate strategic and tactical manoeuvres and his continued involvement beyond the time when it is clear he will be called upon to testify.

[21] In short, it is my view that counsel for the Plaintiff who was present at the settlement meeting which he and his client say resulted in a settlement agreement is a crucial witness both as to the existence of an agreement as well as to the terms of that agreement. I can see no situation where that counsel would not be required to testify either in support of his own client's position or, if he cannot do so, as a witness for the Defendant. Clearly, his evidence as to the existence of an agreement will be contradicted by the Defendant or, perhaps, by his own client if his evidence supports that of the Defendant.

[22] Again, the integrity of the judicial system requires the removal of counsel for the Plaintiff at this time in relation to the issue over the existence of, and terms of, a settlement agreement. In this case, the interests of the administration of justice outweigh the Plaintiff's right to counsel of her choice.

[23] I would make one other point, however. The Plaintiff's position is that a settlement agreement was reached. If the Plaintiff loses on that issue, and the results at trial on the substantive issues are less favourable to her than the settlement would have been, where does the Plaintiff then turn and who does she hold responsible for the settlement agreement being ineffective?

[24] Having made this order and recognizing that inevitable delays will result in new counsel being retained to act on behalf of the Plaintiff, I will direct the parties to apply to the Chief Justice for case management and I will act as the case manager to ensure that it proceeds on a timely basis.

Heard on the 09th day of January, 2008.

Delivered orally at the City of Edmonton, Alberta the 9th day of January, 2008.

Dated at the City of Edmonton, Alberta this 15th day of January, 2008.

Eric F. Macklin
J.C.Q.B.A.

Appearances:

Barry M. King and Bradley J. Willis
Strathcona Law Group
for the Plaintiff

K. June Koska
for the Defendant