IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Sherrington v. Arbuckle*, 2017 NSSM 20

Claim No: SCCH 451782

BETWEEN:

Devin Sherrington

Claimant/ Defendant by Counterclaim

v.

Lauren Arbuckle

Defendant/ Claimant by Counterclaim

Editorial Notice: The electronic version of this judgment has been edited for grammar and punctuation, and addresses and phone numbers have been removed

Derek Brett appeared for the Claimant/Defendant by Counterclaim.

Mary Jane McGinty appeared for the Defendant/Claimant by Counterclaim.

DECISION

Devin Sherrington and Lauren Arbuckle were in a relationship which lasted approximately three years; a time period which included their engagement. The couple had separated on at least one occasion but reconciled after five months or so. On March 21, 2015, Mr. Sherrington proposed marriage and Ms. Arbuckle accepted. The engagement ended (or was postponed) in early-mid April 2016. The relationship ended shortly after. At issue is liability for several expenditures and alleged loans. Most significantly, the parties dispute ownership of the engagement ring.

Bankruptcy of Lauren Arbuckle

The matter has an unusual legal history. The hearing of evidence took place on November 3, 2016 and December 20, 2016. There were several procedural and scheduling matters addressed between those dates. Closing arguments were heard at the end of the December 20th hearing. I reserved judgment and intended to deliver oral or written reasons early in the New Year.

Meanwhile, unbeknownst to the Court, Ms. Arbuckle made an Assignment in Bankruptcy on December 19, 2016, the day before the last day of the hearing. Mr. Brett advised the Court by e-mail of January 5, 2017 that his client had been notified by the Trustee of the Assignment. This was confirmed by Ms. McGinty.

The effect of an Assignment in Bankruptcy is to stay the proceedings and place control of all of Ms. Arbuckle's assets in the hands of her Trustee in Bankruptcy, in this case, BDO Canada Limited. That meant the validity of the second day of the hearing would have been left in some doubt as the matter could not proceed unless the stay was lifted by Order of the Supreme Court. In addition, a significant amount of time would have been wasted as a result.

I refused to proceed until the stay was addressed. The stay was lifted by Order of Justice Gerald P. Moir dated February 23, 2017.

Ms. Arbuckle's decision to choose that particular time to declare bankruptcy is curious. The engagement ring, along with her other assets is vested with the Trustee for the benefit of her creditors. As a result of this decision, that will continue until addressed in the course of the bankruptcy. Nevertheless, this matter may now proceed on its merits as if the stay had not occurred.

Pleadings

There are a Claim and Counterclaim in this matter. Mr. Sherrington alleges Ms. Arbuckle borrowed $6000 and for which he demanded payment. He also claims return of the engagement ring as it is a conditional gift.

Ms. Arbuckle denies the existence of any loan. She further states that since Mr. Sherrington broke off the engagement, she should be the recipient of the engagement ring. In her Counterclaim, Ms. Arbuckle seeks reimbursement for wedding expenses, repayment of a loan she took out to buy Mr. Sherrington a motorcycle and the return of her equipment which she uses in her work as a hairstylist and make-up artist.

Issues

- Who owns the engagement ring?

- Was there a loan made by the Claimant to the Defendant? If so, how much is owing? Was it secured by the engagement ring?

- Is Mr. Sherrington liable to Ms. Arbuckle for any wedding expenses incurred by her?

- Is Mr. Sherrington liable to Ms. Arbuckle for the motorcycle loan?

- What is the status of the make-up and hairdressing equipment?

The Law

Section 9 of the *Small Claims Court Act* sets out the jurisdiction for matters heard before this Court:

"**9**. A person may make a claim under this Act
(a) seeking a monetary award in respect of a matter or thing arising under a contract or a tort where the claim does not exceed twenty-five thousand dollars inclusive of any claim for general damages but exclusive of interest;…
…(c) requesting the delivery to the person of specific personal property where the personal property does not have a value in excess of twenty-five thousand dollars;…"

The Small Claims Court is a creature of statute and limited to the powers and jurisdiction provided to it by the *Small Claims Court Act*. Thus, judgments in Small Claims Court involving the division of assets or liabilities following the termination of a relationship differ from those ordered by the Supreme Court. In a divorce, the Supreme Court may, and often does, direct the transfer of assets and assumption of debts between the parties when ordering a Corollary Relief Judgment. The Small Claims Court is limited to making a "monetary award" as required by s. 9(a) or directing the delivery of specific personal property pursuant to 9(c). In order to do that, a cause of action must be proven or in the case of property, ownership or some other form of entitlement to possess the asset. In a divorce proceeding, the Supreme Court orders a division of assets and payment of debts based on the various provisions of the *Matrimonial Property Act*. For the sake of completeness, the Supreme Court may also order payments based on resulting trust on a divorce or a break up of a common law relationship.

The effect of section 9 is to limit the type and manner of claims that can be heard by the Small Claims Court to monetary awards based on contracts or torts and the delivery of property. Mr. Sherrington's claim for the engagement ring is based on an allegation of an unperfected conditional gift (strictly speaking, the tort of either conversion or detinue). Otherwise, neither the claim nor the counterclaim are based in tort. Thus, in order to find liability, I must find there to have been a contract between the parties with respect to payment of their liabilities. It is not enough to demonstrate a contractual relationship, but a breach of that contract. The remedy ordered by this court in such cases is the payment of money.

Jurisdiction

The principal claim is for return of the engagement ring plus $6000 in a loan.

There are three separate figures representing the value of the ring. Mr. Sherrington stated that he paid approximately $16,000, although there is no receipt for that amount; meanwhile, he tendered into evidence a credit card bill showing a payment of $8819.28.

Ms. Arbuckle later stated the ring was appraised at $23,100, although no such appraisal was provided in evidence. The ring was not tendered. There are no photographs or descriptions.

No objection was raised to the matter being heard in Small Claims Court. There was no motion made by the Claimant to limit the matter to $25,000. Therefore, I find the ring is not worth $23,100. Mathematically, it can be no more than $19,000. I find the Court has jurisdiction. In the end, it is a moot point.

The Evidence

The evidence in this matter consisted of the oral evidence of the parties and several witnesses for the Defendant. There were hard copies of text messages, Facebook messages and e-mails tendered as well. For the latter evidence, I have summarized it as part of the findings below. It is not necessary or helpful to state the contents of the messages in their entirety. I have only included direct quotes where appropriate to do so.

There are portions of the evidence which I have not mentioned in this decision. However, these have been considered and given the weight they are due.

Devin Sherrington

Devin Sherrington testified that he and Lauren Arbuckle were engaged for approximately one year but had been in a relationship for approximately three years. He purchased the engagement ring, which contained a 3.25 carat diamond.

Mr. Sherrington testified that the wedding budget was becoming a very contentious issue. He sought to err on the less expensive side while Ms. Arbuckle preferred a more lavish affair. As a result of the disagreement and the strain it was having on their relationship, Mr. Sherrington suggested they postpone the wedding. This took place on March 29. Ms. Arbuckle did not agree with that idea at all. She proposed several options to split the cost of the wedding but none of them were acceptable to him. Mr. Sherrington did not believe she could save her share of the money in time and he would get stuck paying the balance. Mr. Sherrington confirmed to Ms. Arbuckle the wedding

was postponed on April 14. Ms. Arbuckle took care of cancelling the arrangements. Mr. Sherrington and Ms. Arbuckle attended to a counsellor in hopes of reconciling. Mr. Sherrington maintained that the wedding was postponed and not cancelled. According to Mr. Sherrington, Ms. Arbuckle chose to end the relationship on approximately April 10.

On or around May 8, Mr. Sherrington contacted Ms. Arbuckle and suggested he still owned the engagement ring on the ground that it was a conditional gift. He had indicated Ms. Arbuckle owed him approximately $6000 to cover a trip to Mexico the

parties took the previous year. It was his intent to hold the ring as collateral for this sum. He testified that Ms. Arbuckle had not paid him back.

There were various wedding expenses discussed in evidence. Mr. Sherrington sought to mitigate his losses by having payment for the wedding photographer, Katelyn, paid through complementary personal training (Mr. Sherrington's business is as a personal trainer) or by taking promotional shots for his business. There were discussions at various times that Ms. Arbuckle would pay for the dress and other expenses. Mr. Sherrington appears to have covered some of the late charges. He identified several other expenses for which he paid or that Ms. Arbuckle paid.

Mr. Sherrington testified that he persistently tried to be positive and get along with Ms. Arbuckle as she had not yet moved out of their apartment. Between April 16 and 19th, there were discussions about possibly mending the relationship and going away on a trip. This did not materialize.

Under cross-examination, Mr. Sherrington acknowledged that he and Ms. Arbuckle intended to split the costs of the wedding. The only cash outlay as at the date of the hearing was $2000 paid to a wedding planner. The budget in evidence was prepared by the wedding planner. There were no references to barter or complementary services to Katelyn. In his evidence, he submitted a different budget which he acknowledged was prepared by his accountant in preparation for this hearing. It is not a budget but a summary.

Mr. Sherrington acknowledged that he was becoming fearful of the increasing cost of the wedding. Ms. Arbuckle proposed new dates for the wedding but he did not wish to do that because they were not getting along. He acknowledged that Ms. Arbuckle should have been able to save extra money from her extra work during wedding seasons. He confirmed that the wedding date was set for October 8, 2016 but called off in April 2016. Many of the services they booked had 180 day limit to cancel weddings. They were now within that limit and, therefore, they would not be able to get their money back.

He confirmed the following exchange as part of the text messages on April 22:

"**Sherrington**: Do you just want to keep your ring?
Sherrington: It's up to u

Arbuckle: I would like to yes. Is that ok?

Sherrington: Sure it's up to u. If u need money later (we)can always do something with that"

Mr. Sherrington confirmed he only made one demand for payment before commencing this Claim. In addition, Ms. Arbuckle paid off the motorcycle, except for a few payments he made when they split up. He acknowledged accepting payments on the $6000 sum.

They reviewed other expenses paid by Ms. Arbuckle but Mr. Sherrington could not confirm the extent they were paid. He confirmed being excited that Ms. Arbuckle was able to pare down the wedding costs to approximately $22,000-$24,000.

Dorothy Patrice (“Patsy”) Arbuckle

Patsy Arbuckle is Lauren Arbuckle's mother. She confirmed Lauren telling her about the wedding being cancelled. She described her discussions with Devin Sherrington. It was clear to her that Mr. Sherrington was fed up with Lauren. Mr. Sherrington did not mention Lauren owing him any money.

In cross-examination, she confirmed that there were no discussions about delaying the wedding date. There was no indication from Mr. Sherrington that he wanted to break off the wedding.

Candace Arbuckle

Candace Arbuckle is Lauren's sister. They are close and speak or text several times a week. Lauren told her that Devin did not want to get married. She agreed with Mr. Brett there is a difference between postponing the wedding and cancelling it.

Meaghan Brittany Ryan

Ms. Ryan is a friend and coworker of Lauren Arbuckle. They are both hairstylists and makeup artists and have been so for at least 10 years or more. She was asked to be a bridesmaid. Ms. Arbuckle told her Mr. Sherrington proposed putting the wedding off until the following year. Ms. Arbuckle later told her there would be no wedding because Mr. Sherrington called it off. She had not seen any of the e-mails or texts between Mr. Sherrington and Ms. Arbuckle. She had never spoken with Mr. Sherrington about any of the loans or money.

Lauren Arbuckle

Lauren Arbuckle confirmed being engaged to Devin Sherrington from March 2015 to April 2016. She was excited to get married. In her texts, she noted she originally wanted to elope but Mr. Sherrington wanted “a party”.

She confirmed that both she and Mr. Sherrington paid wedding expenses and cancellation fees. She confirmed they took a trip to Mexico on January 31, 2015 which was booked on December 1, 2014. Each of them paid portions of the expenses.

Ms. Arbuckle acknowledged paying a debt of $6000 to Mr. Sherrington but testified that it was simply to "shut him up". She has paid $3086 to date. She asked Mr. Sherrington for justification of the loan but he did not provide any. He simply wanted collateral for

$6000. With respect to her items in their house, she confirmed that some things including her tools were not returned.

She testified the decision to break off their relationship was a mutual decision after the wedding was called off.

Ms. Arbuckle tendered into evidence a list of the various items paid for the wedding. The parties did not reschedule the wedding as Mr. Sherrington would not give a date for a new one. When asked for a new date, sometimes Mr. Sherrington would say “no” and other times his reply was that he would “think about it”.

Under cross-examination, she acknowledged having the ring in her possession. She indicated that there was a lot of correspondence including text messages back and forth. Ms. Arbuckle prefers to call. Mr. Sherrington prefers a “paper trail”. She attempted to remove her items from a storage unit for which she has access but found it impossible to get into. As a result, she had to borrow makeup tools from her co-workers. He would not allow her access to his place to retrieve her belongings.

She confirmed Mr. Sherrington's concerns were largely with money. She attempted to negotiate the sharing of some of the expenses and attempted to reduce the overall costs. Mr. Sherrington attempted to negotiate Katelyn’s photography services with personal training.

Ms. Arbuckle confirmed that she stopped attending the couples therapy sessions and stating she did not wish to plan another wedding. She testified Mr. Sherrington told her to keep the ring. She has not attempted to sell it yet.

Findings and Legal Analysis

In reviewing the evidence, I find much of the conduct of both parties to be ambiguous. I make the following findings:

Engagement Ring

Both counsel have made excellent submissions on behalf of their clients. In addition, Ms. McGinty provided a helpful brief. As with the evidence, I have considered counsel’s able submissions carefully.

In her brief, Ms. McGinty cites the case of *Iliopoulous v. Gettas* (1981), 32 O.R. (2d) 636 at 639 (Co. Ct.) where the Court states as follows:

> “The origins of the engagement ring and the engagement in our law was outlined in *Cohen v. Sellar*, [1926] 1 K.B. 536, by McCardie J. At p. 547, he quotes with approval the conclusions of Shearman J. in *Jacobs v. Davis*, [1917] 2 K.B. 532 at p. 533:

> "Though the origin of the engagement ring has been forgotten, it still retains its character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it. Whether the ring is a pledge or a conditional gift, the result is the same. The engagement ring given by the plaintiff to the defendant was given upon the implied condition that it should be returned if the defendant" (i.e., the lady) "broke off the engagement. She did break the contract, and therefore must return the ring." It seems reasonably clear that Shearman J. impliedly held that if the plaintiff himself had broken off the promise he could not get back the ring....
>
> ...This I hold to be the correct legal view. If a woman who has received a ring refuses to fulfil the conditions of the gift she must return it. So, on the other hand, I think that if the man has, without a recognized legal justification, refused to carry out his promise of marriage, he cannot demand the return of the engagement ring. It matters not in law that the repudiation of the promise may turn out to the ultimate advantage of both parties. A judge must apply the existing law as to the limits of justification for breach."

Various aspects of today's understanding of marriage and engagement differ from how things were in 1917 when the principle was first written. One key change is that an engagement ring can be given between same-sex partners or from a woman to a man. Of course, that would be recognized equally in law. It is the conditional aspect of the gift, the marriage or the intent to marry, which is the critical issue. The determination of the entitlement to the engagement ring is based upon who broke off the engagement and who didn't. That remains the accepted legal test one-hundred years later.

The parties were engaged from March 25, 2015 to April 2016. It is clear from the evidence that Devin Sherrington postponed the wedding. He made this decision unilaterally. Ms. Arbuckle disagreed with that decision. It is equally clear that Ms. Arbuckle called off the relationship.

Mr. Sherrington initially hoped for a reconciliation so the couple attended counselling. Ms. Arbuckle testified that she attempted to propose new dates but Mr. Sherrington refused. She was not cross-examined on this point. Mr. Sherrington did not refute this point. I find Mr. Sherrington would not agree to any further dates or time periods.

His reasons for doing so may well have been sound, namely, he may have been taking a more cautious approach to see how the relationship would go. He certainly wanted to get their budget issues under control. I find the postponement was an indefinite postponement, sufficient to treat the engagement as over. Ms. Arbuckle may have ended the relationship but Mr. Sherrington ended the engagement.

In addition, based on the portion of text messages of April 22, I find Mr. Sherrington actually gave Ms. Arbuckle the ring at that point. It can be hardly clearer with the statements "Do you want to just keep your ring?" When answered affirmatively, his response was "If you need money later, we can do something with that." In other words, the ring was hers to keep with the suggestion or expectation that she could do something with it if she needed money later. This is further enhanced by his seeking to hold the ring as collateral to the $6000. It is not consistent for Mr. Sherrington to

suggest that he owns the ring outright while purporting to use the ring as collateral on a debt where he is the creditor.

In my view, as of April 22, 2016, the ring belonged exclusively and unconditionally to Lauren Arbuckle, regardless of who broke off the engagement. As noted further, I find there was no agreement that it be pledged as collateral.

The ring is in the possession of the Trustee in Bankruptcy. Therefore, I need not make any order as to its delivery. This portion of the claim is dismissed.

Loans and Expenses

There are various claims for loans and expenses incurred in planning the wedding.

The parties lived together before the engagement ended. The couple maintained separate finances.

In the case of *Rayner v Smith*, 2010 NSSM 6, Adjudicator Augustus Richardson, QC, dealt with the issue of joint expenses between common law couples. I would add that the following passages would apply to the parties and their respective expenses if they had maintained separate residences:

"[35] There are a number of difficulties in dealing with such claims.

[36] The first difficulty revolves around the attempt to "account" for the multitude of economic contributions that are made by individuals to the "common account" during the course of the relationship.

[37] When people join together in a common law relationship they often merge their finances. The income and expenses of one become the income and expenses of both. As well, the way in which that common burden is shouldered varies from couple to couple. In one all income and expenses may be tracked and shared on a 50/50 basis; in another, on a pro-rated basis; and in a third, one partner may pay all the basic living expenses while the other contributes to the joint retirement savings. The fact then that a loan is taken out in the name of one does not mean necessarily that it is for the benefit of that person alone–it may be for and often is for the benefit of both.

[38] Specific agreements to share expenses or to contribute to the purchase or property are enforceable as contract. On the other hand, gifts of property that are made with no expectation of return or repayment cannot be turned into agreements to repay by subsequent regret in the event that the relationship falls apart: see, for e.g., *Cook v. Orr*, *supra*, at paras 8 and 14. The difficulty lies in distinguishing between the two. That task is not an easy one, especially given that contributions to the common good (what are, in effect, gifts) are "precisely the kind of thing people do for each other when they are in a caring relationship:" *Cook v. Orr*, per Adjudicator Slone at para.14.

[39] The second difficulty, which springs from the first, has to do with how best to determine whether particular transactions are "gifts" or "agreements to contribute." Something which on its face may appear to be a gift may in context of the entire history of the relationship be an "agreement to contribute,"–or *vice versa*. Alternatively, something that started out as an "agreement to contribute" may over time have become a gift. For an Adjudicator to hear one claim in isolation deprives him or her of the ability to consider the claim in the context of the relationship that gave birth to it.

[40] The third difficulty is that notwithstanding the fact that the parties are in a "common law" relationship it remains the case that they have chosen not to marry. Marriage by law legitimizes the notion of the common good. It signals an agreement to be bound by the provisions of the *Matrimonial Property Act*. It thereby ensures to some extent that financial burdens are *prima facie* assumed to be joint burdens and hence joint liabilities. Those who do not marry cannot rely upon that assumption. For whatever reason they have chosen not to be governed by the same law that governs married couples: see, in general, *Attorney General of Nova Scotia v. Walsh*, [2002] 4 SCR 325 at paras.35, 40, 43, 49. And it means as a result that a common law partner who decides unilaterally to incur a debt cannot automatically assume that the burden of that debt will be shared by his or her partner, even if that partner takes some advantage from the debt. Whether or not the burden was jointly assumed will have to depend upon the facts of each case."

While not binding on me, I find Adjudicator Richardson's analysis both accurate and persuasive. The parties maintained separate bank accounts and other assets and paid expenditures as they arose. That was how they treated their common expenses. Thus, the expenditures are not presumed shared contracts. Further evidence to that effect is required.

<u>$6000 "Loan"</u>

I find the $6000 amount was not a loan in the sense that money was borrowed. It was an agreement to contribute $6000 towards expenses, purportedly to the cost of the trip to Mexico in January 2015. The agreement to pay $6000 took place in April 2016. I find Ms. Arbuckle paid $3086 to date. I do not believe the $6000 related to the trip. That was just a convenient attempt at justification. There was an agreement to contribute $6000 toward expenses, for which Ms. Arbuckle has $2914 remaining. On the slightest balance of probabilities, I find Ms. Arbuckle liable to Mr. Sherrington for $2914.

Mr. Sherrington testified that the engagement ring was collateral for the $6000. In order to prove that such a contract existed, the parties must show certainty of terms and an intention to be legally bound by such an arrangement. As stated above, there was no loan. It was an agreement to contribute toward expenses. I find the notion of the ring as security came only on May 8th, several weeks after Ms. Arbuckle was told by Mr. Sherrington on April 22nd to keep the ring. The security was an afterthought.

In order to establish the ring was collateral requires proof of Ms. Arbuckle's agreement at the time the funds were advanced or the liability created. There is no evidence whatsoever to that effect. Accordingly, I find there was no security given for payment.

I find Ms. Arbuckle liable to Mr. Sherrington for $2914. The liability is unsecured.

<u>Wedding Expenses</u>

In her counterclaim, Ms. Arbuckle seeks contribution towards a number of expenses which she incurred as a result of the wedding being cancelled.

The evidence is clear that each party assumed certain bills on their own accord. The agreement for each was made mutually as it arose. I find the evidence insufficient to support Ms. Arbuckle's claim for wedding expenses.

Motorcycle Loan

Reference to this loan can be found in the text messages between the parties on October 10, 2014 provided in Tab 7of exhibit 1. I find the motorcycle loan was assumed by Ms. Arbuckle, even though some of the payments were paid by Mr. Sherrington.

The motorcycle was a gift to Mr. Sherrington. It was paid by Ms. Arbuckle through a loan. Except for individual payments on an *ad hoc* basis, it was not Ms. Arbuckle's intention that Mr. Sherrington be responsible for that loan.

This portion of the claim is dismissed.

Hair/Make-up Tools

Ms. Arbuckle testified that her hair and make-up equipment is located in the storage unit which was packed by Mr. Sherrington. She has been unable to locate them in the unit. Mr. Sherrington denies they are there. Ms. Arbuckle has not asked for the return of her equipment but seeks compensation. I find Ms. Arbuckle has not established that the

items were last in Mr. Sherrington's possession or control. I deny this aspect of the Counterclaim.

Prejudgment Interest/Costs

In the circumstances, I am disinclined to award prejudgment interest. I also find this an appropriate case for each party to bear their own costs.

Conclusion

As a result of the above, I allow the Claim in part. Devin Sherrington shall have judgment against Lauren Arbuckle in the amount of $2914. The balance of the Claim and the entirety of the Counterclaim are dismissed. Each party shall bear their own costs.

An order shall be issued accordingly.

Dated at Halifax, NS,
on April 19, 2017;

_____

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)