SUPREME COURT OF NOVA SCOTIA
Citation: *Lee v. Lee Estate*, 2018 NSSC 250

Date: 2018-10-10
Docket: *Syd*, No. 438354
Registry: Sydney

Between:

Joseph Mathias Lee

Applicant

v.

The Estate of Anita Lee, as represented by Veronica Murray in her capacity as the Executrix of the said Estate and in her personal capacity

Respondents

Motion Decision

Judge: The Honourable Justice Robin C. Gogan

Heard: July 3, 2018, in Sydney, Nova Scotia

Counsel: Daniel Burman, for the Applicant
Joseph Mathias Lee, Respondent, in person

By the Court:

Introduction

[1] The Estate of Anita Lee and Veronica Murray move for an Order enforcing a settlement agreement. They say that a settlement was reached prior to a hearing in this proceeding. The settlement was reached between counsel for the parties and now binds the applicant, Joseph Lee. Lee subsequently discharged his counsel.

[2] For the reasons that follow, I find that an agreement was reached between the parties to fully and finally resolve this proceeding.

Background

[3] Anita Lee died on June 8, 2014. She left behind a son, Joseph Lee and a daughter Veronica Murray, among other children. Mr. Lee and Ms. Murray were the only active participants in the litigation.

[4] This motion relates to two proceedings commenced by Joseph Lee. The initial proceeding sought Proof in Solemn Form of a will purported to be the Last Will and Testament of Anita Lee dated May 9, 2014. A subsequent proceeding sought to set aside a conveyance made by Anita Lee on May 9, 2014. The common allegation in the proceedings was that Anita Lee was incapacitated by

illness, incompetent, and subject to undue influence at the relevant times. The proceedings were consolidated by Order dated October 3, 2016.

[5] The proceeding had a somewhat complicated path which need not be reviewed here. The matter was initially scheduled for hearing on April 5, 6 and 7, 2017. By consent, the matter was adjourned to June 21, 22 and 23, 2017. The parties filed affidavit evidence and pre-trial briefs in anticipation of the June hearing dates.

[6] The evidence supporting the motion is uncontested. The parties began negotiations with a view to settling the consolidated proceeding in May 2017. The initial offer came verbally from the applicant's counsel and proposed dismissal of the proceeding for $20,000.00 as well as a confidentiality agreement with a penalty clause. This offer was not accepted. The parties exchanged settlement positions into June 2017.

[7] On June 13, 2017, the respondents' counsel wrote to the applicant's counsel confirming a settlement. The entirety of the body of the letter follows for convenience:

> This correspondence will confirm that we have reached a settlement in this matter.
>
> The settlement terms would include the following:

1. That your client would be paid $ … by my client.

2. That both of our clients would enter into a Confidentiality Agreement with regards to the particulars, which would have the standard penalty clause for your client only. The standard wording would be that the liquidated damages would be $..., in addition to any recovery costs on a solicitor-client basis.

3. There will be no penalty clause regarding my client in the Confidentiality Agreement.

4. The Order will confirm that all interested parties were served with the application and chose not to take part, with further comfort wording with regards to their claims being *res judicata*.

5. The Consent Order shall confirm that your clients application challenging the Deed and the Will on the basis of undue influence and incapacity to execute the Deed are dismissed.

6. The Consent Order will further state that the parties acknowledge that in the particular, Anita Lee had capacity to sign the Will and the Deed on May 9, 2014 and further agree that there was no undue influence with regards to the circumstances surrounding the signature of those documents.

I trust the foregoing is satisfactory and await the draft Order.

[8] On June 13, 2017, counsel for the applicant wrote to the court confirming that an "agreement in principle" had been reached, and that the hearing dates would not be required. Counsel anticipated filing Orders the following week. At that point, the parties anticipated drafting a dismissal order and a confidentiality agreement.

[9] Counsel for the applicant filed an affidavit confirming that she had clear instructions to resolve the proceedings by way of a monetary payment (which is not in dispute), a confidentiality agreement (to be drafted by respondents' counsel), and an order dismissing the proceeding without costs to either party (to be drafted by applicant's counsel). Joseph Lee did not dispute providing these instructions to his lawyer.

[10] The draft order produced by applicant's counsel was forwarded to respondents' counsel on June 14, 2017. The order accompanied an email exchange between counsel on June 14, 2017 confirming that the applicant's counsel had received the letter dated June 13, 2017 from the respondents' counsel and raised some small caveats. Respondents' counsel replied inside thirty minutes confirming "… agreed on all counts". After receiving the draft order and an email exchange, counsel for the respondents confirmed to the court that a settlement had been reached.

[11] Subsequent to the foregoing, Joseph Lee contacted his lawyer to raise misgivings about the settlement. His issue then was in relation to his legal costs. He felt he should have both the settlement and his costs. Mr. Lee and his lawyer parted ways at that point.

[12] The respondents filed this motion to enforce the settlement agreement on February 22, 2018. In response, Joseph Lee filed a document entitled "objection" and a letter in support. The motion was originally scheduled to be heard on March 28, 2018. The hearing was subsequently adjourned to July 3, 2018. Mr. Lee was given until April 11, 2018 to file his evidence and submissions. Nothing was filed.

Issue

[13] Is there an enforceable agreement between the parties? If so, what are the terms of the agreement?

Position of the Parties

Estate of Anita Lee and Veronica Murray

[14] The Estate of Anita Lee and Veronica Murray submit that a binding settlement was achieved. The respondents' rely upon the trial decision in ***Rother v. Rother***, [2004] N.S.J. No. 312 (NSSC) as upheld by the Nova Scotia Court of Appeal at [2005] N.S.J. No. 138 (NSCA). The focus of these decisions is on counsel's actual and apparent authority to enter into settlement agreements.

Joseph Lee

[15] Although Joseph Lee filed an objection to the motion, he did not file any evidence. He did participate in the motion hearing and provided submissions. He did not cross-examine the deponents on their affidavits. He did not dispute giving instructions to his lawyer as set out in the evidence. His focus was on the proposed confidentiality or non-disclosure agreement. He is not opposed to entering into such an agreement. Rather, he argues that he needs to review the proposed agreement and its specific terms before he can agree to it.

Analysis

[16] This motion is brought pursuant to Civil Procedure Rule 10.04(1) and (2):

> **Enforcement of settlement agreement or arbitration award**
>
> **10.04(1)** A party who alleges that, after a proceeding was started, the parties reached agreement for settlement of the proceeding or of a claim in the proceeding may make a motion for an order giving effect to the agreement.
>
> **(2)** The judge who hears the motion may do any of the following:
>
> (a) declare that an agreement was, or was not, made and is, or is not enforceable;
>
> (b) declare the terms of an agreement;
>
> (c) grant an order enforcing an agreement according to its terms;

> (d) order a trial under Rule 4 – Action or hearing under Rule 5 – Application and give directions about the issues to be determined.

[17] The Estate of Anita Lee and Veronica Murray seek a declaration that a settlement was reached between the parties and a further declaration of the terms.

[18] The authorities clearly establish that litigants are bound by settlements made by their counsel acting within the scope of their apparent authority (See ***Landry v. Landry*** (1981) 48 N.S.R. (2d) 136, ***Rother v. Rother***, *supra*). At the conclusion of the motion hearing, Lee acknowledged that his lawyer did have actual authority to agree to the settlement terms as set out by the respondents.

[19] However, Joseph Lee maintains that he is not bound to a confidentiality or non-disclosure agreement that was never drafted. It was his view that the proposed agreement should have been forwarded it to him so that he could review and approve its terms. The respondents say that the various written exchanges between counsel contain all the terms and are the basis of an agreement that is now binding and enforceable.

[20] Before moving further, I must highlight that the only evidence as to the settlement negotiations comes from the affidavits filed by Veronica Murray and former counsel to Joseph Lee. This evidence establishes that Mr. Lee's counsel

had instructions to settle the proceeding on the terms set out in correspondence and subsequent email exchanges. In that, there is no dispute at this point.

[21] Joseph Lee now objects to a confidentiality or non-disclosure agreement on the basis that he has not been provided with or reviewed any such agreement. He says that this failure was his only issue with the settlement. With respect, the evidence does not support such an assertion. Rather, it supports the conclusion that Mr. Lee initially objected to the settlement on the basis that he thought he would also be entitled to his legal costs. His present objection to the settlement terms rings hollow. And it was not until the motion hearing that Mr. Lee acknowledged giving his lawyer instructions to agree to the proposed terms.

[22] I note the recent decision of the Nova Scotia Court of Appeal in ***Piper v. Piper***, 2018 NSCA 53 which sets out the proper approach to determinations of this kind. The reasons of Van den Eynden, J.A. contemplate binding agreements not encapsulated in a single document. At para. 85 (quoting from Fridman, *The Law of Contract in Canada*) she concluded:

> If there is no single document to which reference can be made in order to decided if a contract exists between the parties, but a series of negotiations, then everything that occurs between the parties relevant to the alleged contract must be considered by the court which is faced with the problem of deciding the issue. From what they have said, done or written, in combination if necessary, there must be established a bargain or an agreement.

[23] And later at paras. 88 and 89:

> [88] Because there were many, rather than a single document said to contain the agreement, in my view, the judge should have applied a two-step test: (1) did the parties enter a legally binding agreement; and (2) how should that agreement be interpreted? She did not do so.
>
> [89] Step one required a careful review of all relevant communications to ascertain whether the parties entered into a legally binding agreement or an agreement to agree. That exercise is a laborious task, however, it is unavoidable in the circumstances…

[24] Reliance is also placed upon the thorough reasons of Vallee, J. in ***1648290 Ontario Ltd. V. Bhabha***, 2018 ONSC 1044. In that case, the defendant moved to enforce a settlement agreement. Negotiations took place orally and in writing over two days. An agreement was reached subject to the terms of a final release. The trial judge proceeded on the basis of the common law test that the parties must have a mutual intent to be bound and must agree to all essential terms. He concluded a binding agreement existed at para. 46:

> [46] Clearly, neither party considered itself bound by the language of the release attached to the email. Based on the evidence before me, I find that during the telephone call when counsel agreed to terms, they agreed that the parties would enter into a mutually agreeable release with a confidentiality clause. They did not agree to the specific language that would be in the release. I rely on *Kaur* paragraph 19 in concluding that the specific language was not an essential term of the settlement

> agreement. The fact that the parties did not agree on the specific language in the release is not a valid reason to suggest that the parties had not reached an agreement on all essential terms. It does not negate the agreement.

[25] Similarly, in the present case, I find the parties agreed on all the essential terms as follows:

(a) That the proceeding would be dismissed in return for a monetary payment to Joseph Lee (the amount of which is not disputed);

(b) That the payment would be made to Joseph Lee within 30 days;

(c) That the dismissal order would be without costs to either party;

(d) That the parties would enter into a confidentiality or non-disclosure agreement whereby neither party would disclose the terms of settlement. In the event of non-compliance by Joseph Lee, he would be liable to pay damages (the amount of which is not disputed) and solicitor client costs.

[26] I note that the form of the dismissal order drafted by Joseph Lee's counsel was accepted in both form and content by the respondents. It represents an enforceable bargain against Mr. Lee in the context of a binding agreement. In the circumstances, I would dispense with a further non-disclosure agreement and

incorporate the essential terms as found in para. 25(a), (b) and (d) above into one order. I would ask counsel for the respondents to draft the order.

[27] I reserve the right to provide further directions in this matter if required by either party.

Conclusion

[28] I find the parties resolved this proceeding by way of a binding settlement which is enforceable against Joseph Lee. Counsel for the respondents shall draft an Order reflecting this decision within ten business days.

[29] The Estate of Lee and Veronica Murray are the successful parties and are entitled to costs. Mr. Burman is to file an affidavit of costs within ten business days along with any further submission on costs. Joseph Lee shall file any submission on costs within ten business days of receipt of the respondents' affidavit of costs.

Gogan, J.