CanLII

ESB v SDB, 2017 ABQB 522 (CanLII)

Date: 2017-08-30
File number: 4801 154714
Citation: ESB v SDB, 2017 ABQB 522 (CanLII), <http://canlii.ca/t/h5p4r>, retrieved on 2018-09-17

Court of Queen's Bench of Alberta

Citation: ESB v SDB, 2017 ABQB 522

Date:
Docket: 4801 154714
Registry: Calgary

Between:

ESB

Plaintiff/Respondent/Cross Applicant

- and -

SDB
(also known as SDG)

Defendant/Applicant/Cross Respondent

Corrected judgment: A corrigendum was issued on May 22, 2018; the corrections have been made to the text and the corrigendum is appended to this judgment.

Ruling on Costs
of the
Honourable Mr. Justice C.M. Jones

[1] This matter came before me on November 29, 2016. The parties have two daughters aged 10 and 14. They have had a shared parenting arrangement since they separated in October of 2007.

[2] The parties entered into a Separation Agreement with effect from November 7, 2007. At that time, the parties, as reflected in that agreement, estimated ESB's guideline income to be $65,000 and SDB's guideline income to be $55,000.

[3] In that agreement, the parties agreed to reserve child support, with the exception of certain specific amounts of a non-repeating nature which, should they arise, were to be paid into an RESP for the children.

[4] They agreed to share school and clothing expenses on a 50/50 basis.

[5] The parties agreed to exchange income tax returns each year starting in 2009 for the purpose of evaluating child support obligations. Those exchanges do not appear to have occurred. The first request for financial information appears to have emanated from SDB in January of 2016.

[6] SDB sought retroactive and ongoing child support. She also sought imputation of income to ESB above that which he reported on his T1 Income Tax Returns as employment income. She requested that additional amounts in respect of rental income, dividends and capital gains be imputed.

[7] SDB suffers from multiple sclerosis. She works part time as a speech therapist and sought to have her income based on her current line 150 amount of approximately $52,000.00. She argued that her long term disability payments in this amount are, in view of her incapacity, a reasonable proxy for her income earning ability.

[8] The large capital gain which she wished to have added to ESB's income arose once, in connection with the sale of a rental property. ESB incurred a large dividend from a family company (SBB) in 2013. That, he alleges, was an advance of his inheritance from his parents. To reflect this premise, he advocated that $93,000 of the total dividends received by him in that year should be backed out of his income for child support purposes.

[9] SDB sought to have income imputed to ESB for retroactive child support purposes back to 2009. ESB resisted that request, arguing that the case law would support no more than a three year look back on these facts.

[10] He took the position that no retroactive child support should be payable by either party up to January of 2016 when SDB filed her Application. Alternatively, he took the position that no such retroactive award should be made up to May 7, 2013. On that date, this Court, *inter alia* granted a Divorce Judgment. The preamble to that Order stated that ESB's guideline income was $65,000.00 and SDB's guideline income was $55,000.00. The Order states that the Court was advised of these amounts. Both parties had counsel.

[11] I ultimately determined their guideline incomes to be $149,016.00 (ESB) and $105,022.00 (SDB) for the 2012 year. I determined their guideline incomes to be $193,430.00 and $101,369.00, respectively, for the 2013 year.

[12] Accordingly, I am satisfied that the Order issued by this Court on May 7, 2013 understates both of their incomes leading up to and including the year of their divorce.

[13] Both parties alleged that the other acted improperly in not accurately disclosing changes in their respective incomes as the years went by. In my view, both of them withheld that information from the other.

[14] ESB originally sought solicitor client costs in the amount of $20,000 in respect of efforts he claims to have made to secure SDB's medical records. He ultimately reduced that request to $5,000.

[15] He sought to impute additional income to her for child support purposes, alleging that, despite suffering from multiple sclerosis, she could have worked more than .7 of full time. He argues that her condition was not permanent.

[16] He sought to have her income for section 3 child support purposes computed on the basis of gross business income rather than business income net of expenses. SDB acceded to this position both prior to and at the hearing before me. He conceded that dividends in the amount of $25,000.00 per annum should be included in his income for section 3 purposes.

[17] One of the issues in this case was the nature of ESB's interest in SBB and the income, if any, that he had and could be expected to receive from it.

[18] There was also discussion of the role played by a private corporation referred to as "Ridge". ESB allegedly formed Ridge in order offer his services as a consultant when he left his previous employer.

[19] ESB paid no child support for the years 2009 through 2015, despite having income, as I determined, of between $112,805.00 and $193,430.00, depending on the particular year. SDB apparently never advised ESB that her income had changed from the $55,000.00 figure used in the Separation Agreement and communicated to this Court in May of 2013. I determined her income for the period 2009 to 2015 to be between $74,581.00 and $105,022.00, depending on the particular year.

[20] Each accused the other of deficient disclosure. The parties had many apparent justifications for their failure to communicate increases in their respective incomes between 2009 and 2016, and for why their own conduct should not be viewed as blameworthy.

[21] Their affidavit evidence largely conflicted on several key points relating to their respective abilities to earn income.

[22] At the hearing before me, I directed the parties to prepare a form of Order that implemented the following decisions, which reflected my imputation of income:

a) ESB's income would, for the period 2009 to 2015, be determined to be his employment income of $118,000, plus actual dividends received by him, plus net rental income received by him but with no inclusion for

capital gain arising from the sale of rental property. To arrive at his line 150 income for 2016 and subsequent years, I directed that base income of $118,000.00 be added to the average of actual dividends he received for the years 2012, 2013 and 2014; and

b) SDB's income would be determined to be her actual gross business income for the years 2009 to 2015 and would be $52,156 for 2016 and subsequent years.

These determinations were to be subject to annual adjustment.

[23] The parties submitted very different forms of Orders. I directed the parties to make written submissions regarding their forms of Order.

[24] Each of the parties submitted a large volume of material in support of their respective forms of Order, essentially re-arguing certain aspects of their case.

[25] That "re-argument" was primarily reflected in the very different approaches taken by the parties in implementing my directions for the calculation of the parties' respective incomes for the period 2009 to 2015 and going forward after that.

[26] Ultimately, I prepared a form of Order which differed from that provided by either of the parties. The amounts I determined for purposes of retroactive and ongoing child support payable by ESB more closely resembled the amounts set forth in SDB's proposed form of Order than those set forth in ESB's proposed form of Order.

[27] It would not, however, be correct to conclude that this similarity was attributable to closer adherence by SDB than by ESB to the directions given by me on November 29, 2016. My effort to articulate the results of my directions, which were reflected in the Order which I ultimately issued, produced a result which, by chance, SDB's calculations more closely resembled.

[28] I directed the parties to submit argument in respect of costs. Again, the parties were completely at odds in their assessment of responsibility for costs.

[29] SDB sought costs on a solicitor-own, full indemnity basis in the amount of $45,321.68, arguing, once again, that ESB, *inter alia*:

a) failed to negotiate reasonably;

b) failed to honor his child support obligations;

c) acted in bad faith; and

d) bullied and coerced SDB.

[30] In the alternative, she sought costs calculated with reference to column 3 of Schedule C to the Alberta Rules of Court, doubled as of May 19, 2016, in the amount of $43,150.00.

[31] On May 19, 2016, SDB submitted a "with prejudice as to Costs" Calderbank Offer. The amounts she proposed ESB pay in respect of retroactive child support arrears and ongoing child support, which amounts were rejected by ESB, were less than the amounts I ultimately awarded.

[32] Noting that her offer of May 19, 2016 was more favourable to ESB than the final outcome, she argues that Courts have discretion to award double costs from the date of an informal offer: ***T.N.S. v. J.Q.W.***, 2012 ABCA 321 (CanLII) at para 27. She argues that a reasonable, informal offer to settle can be raised to seek advanced costs if the offer was more favourable than the outcome of the proceedings: ***Holizki v. Alberta (Public Trustee)***, 2009 ABQB 260 (CanLII) at paras 39-41.

[33] In the further alternative, SDB seeks to invoke Rule 4.29(1) of the *Alberta Rules of Court* (the "Rules'). That Rule provides that where an applicant makes a formal offer to settle that is not accepted and that applicant subsequently obtains a judgment or order that is equal to or more favourable than the formal offer, the applicant is entitled to double costs for all steps taken in relation to the action or claim after the service of the offer, excluding disbursements.

[34] SDB submitted a formal offer on November 15, 2016. I am satisfied that my decision yielded results more favourable to SDB than contemplated in her formal offer.

[35] Her request for the application of Rule 4.29(1) would, she argues, give rise to an award of costs in the amount of $37,075.00.

[36] ESB challenges SDB's assertions. With respect to her offer of November 15, 2016, he points out that it was open for acceptance until 5:00 p.m. on November 16, 2016. He asserts that the time given to respond was unreasonably short.

[37] He also asserts egregious behaviour on her part relating to the conduct of the litigation.

[38] He argues that his behaviour does not justify an award of solicitor-client costs. He claims his behaviour was neither reprehensible, scandalous nor outrageous: ***Young v. Young***, 1993 CanLII 34 (SCC), [1993] 4 SCR 3. He cites the decision of the Court of Appeal of Alberta in ***Sidorsky v. CFCN Communications Limited, et al.*** 1997 ABCA 280 (CanLII).

[39] At para 28 of that decision, the Court of Appeal cites the circumstances in which the Court should depart from party-party costs. He argues that none of those circumstances are attributable to his behaviour in this litigation.

[40] With respect to SDB's request for full indemnity costs, he cites the decision of the Court of Appeal in ***Pillar Resources Services Inc. v. Prime West Energy Inc.***, 2017 ABCA 19 (CanLII). At para 125 the Court cites examples of blameworthy conduct that could justify full indemnity costs. He asserts that he has committed none of the enumerated acts.

[41] He claims that the parties enjoyed mixed success and should bear their own costs.

[42] SDB filed further, unsolicited, written submissions in response to ESB's submissions. These submissions restated much of what had previously been submitted on her behalf.

[43] Rather than take the position that these further submissions were a further attempt to re-argue her position, I will adopt a less pejorative characterization by referring to this additional submission as an attempt to clarify.

[44] However, this additional submission does adopt a somewhat different tone. It refers to certain elements of the cost submissions prepared by ESB's counsel as "untrue and dishonest".

She alleges that the Concise Letter prepared by ESB's counsel contained information which was "false and inaccurate", an example of "blatant misrepresentation".

Decision

[45] Before considering the specifics of each of the parties' arguments, it is useful to note the Rules applicable to an award of costs:

1. Rule 10.29 provides, *inter alia*, that a successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party;
2. Rule 10.29(a) provides that the principle it enunciates is subject to the Court's discretion to award costs under Rule 10.31;
3. Rule 10.31 confers general discretion upon the Court to award costs, taking into account the factors specified in Rule 10.33;
4. Rule 10.33(1) provides as follows:

   In making a costs award, the Court may consider all or any of the following:

   (a) the result of the action and the degree of success of each party;

   (b) the amount claimed and the amount recovered;

   (c) the importance of the issues;

   (d) the complexity of the action;

   (e) the apportionment of liability;

   (f) the conduct of a party that tended to shorten the action;

   (g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate; and
5. Rule 10.33(2) provides as follows:

   In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

   (a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

   (b) a party's denial of or refusal to admit anything that should have been admitted;

   (c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;

   (d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct.

[46] I am unable to accept ESB's assertion that the parties enjoyed mixed success. With the benefit of time to review the transcript of proceedings before me, the relief sought, the parties' submissions and the evidence, I am satisfied that SDB was the successful party.

[47] I am similarly unable to accept SDB's assertions that ESB was guilty of bad faith, egregious or unconscionable behaviour. Just because ESB resisted SDB's attempts at recovery does not necessarily mean that he acted improperly.

[48] A strong response to another party's attempts to litigate and recover, even if that recovery relates to child support, is not necessarily indicative of bad behaviour just because the party responding disagrees with the quantum of the request.

[49] Full indemnity and solicitor-client costs are not appropriate in this circumstance. Further, I reject SDB's claim to double costs from May 19, 2016, in light of my initial inclination to require the parties to bear their own costs: ***T.N.S.*** v. ***J.Q.W.*** 2012 ABCA 321 (CanLII), para. 27.

[50] I award her costs, computed in accordance with Division 2 of Schedule C of the Rules, with a doubling of costs incurred in respect of all steps taken in relation to this action after November 15, 2016. I am satisfied that column 3 is the appropriate column to apply in these circumstances.

[51] If the parties are unable to agree upon the specifics of line items comprising the calculation of those costs they are at liberty to seek my further direction.

[52] I award ESB $750.00 in respect of his costs to secure medical information regarding SDB.

Heard on the 29th day of November, 2016.
Dated at the City of Calgary, Alberta this 30th day of August, 2017.

C.M. Jones
J.C.Q.B.A.

Appearances:

Diann P. Castle
for the Plaintiff/Respondent/Cross Applicant

Shayi Xu
for the Defendant/Applicant/Cross Respondent

Corrigendum of the Ruling on Costs
of
The Honourable Mr. Justice C.M. Jones

Para 1 states the parties have two daughters. They in fact have one daughter and one son. "Two daughters" will be replaced by "one daughter and one son" by this corrigendum.
