

ONTARIO  
SUPERIOR COURT OF JUSTICE

**BETWEEN:** )  
 )  
Christine Rupert )  
 ) Donna MacFarlane, for the Applicant  
Applicant )  
 )  
- and - )  
 )  
William Mullins Johnson ) Joseph Markin, for the Respondent  
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Respondent )  
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 ) **HEARD:** February 24, 2014

**THOMAS M. WOOD J.:**

- [1] This hearing involved motions by each party dealing with both substantive and procedural issues. The applicant seeks interim spousal support and an interim advance on disbursements. She also seeks the consolidation of the respondent's civil tort action with this action and an order that both actions be tried here. Finally, she seeks the extension of a previously granted restraining order to include a prohibition of Facebook postings about her by the respondent, and disclosure of his counselling records.
- [2] The respondent seeks either a dismissal or a stay of this action until the tort action has been resolved. He opposes a consolidation of the actions and argues that the interim relief sought by the applicant is premature as this action should not proceed.
- [3] Additional issues to be determined are whether the respondent was entitled to an adjournment of the case conference scheduled on January 30, 2014, and costs for that day. For the reasons which follow I would dismiss the respondent's motion and grant the applicant's in part.
- [4] I make the following findings of fact with respect to the history of the parties' relationship. The applicant is 43 years old. She has two biological children and a brother whom she raised as her child. The eldest two who are adults, reside in Sudbury and the youngest with his father in Kitchener. No claim for support is made for any of the boys in these proceedings. The applicant's income since 1997 has been a W.S.I.B. disability pension of \$400 per week.

- [5] The respondent served 13 years of a life sentence for the murder of his four year old niece before the conviction was overturned. This occurred as a result of the discrediting of forensic evidence given by Dr. Charles Smith the province's chief child forensic pathologist in a number of cases. An inquiry (The Gouge Inquiry) set up in part to determine appropriate compensation for those wrongly convicted, awarded the respondent a structured settlement of 4.5 million dollars. His source of income is a monthly payment from this settlement.
- [6] The parties met in 2010 and began living together in July of that year shortly before the settlement was received by the respondent. Initially they lived in Sault Ste. Marie. However in 2011 they moved to Huntsville where they purchased a house at 177 Stahl's Rd. (the Stahl's Rd property). This home was placed in joint tenancy. The applicant claims that the move to Huntsville was an attempt by the respondent, who has a substance abuse problem, to move away from the drug culture of Sault Ste. Marie, and in particular his brother who had hooked the respondent on crack cocaine.
- [7] In October 2012 the parties purchased a second home on Santa's Village Rd. in Bracebridge (the Santa's Village Rd. property). They moved from the Stahl's Rd. property to the new home and rented out the Huntsville location. The applicant deposes that her reason for wanting to move was because the respondent's crack cocaine addiction made him paranoid and vengeful. She had been physically and psychologically assaulted and the isolated rural location of Stahl's Rd made her fearful.
- [8] In June 2011 after what the applicant describes as a prolonged, cocaine fed rampage by the respondent, the applicant called the local women's shelter who arranged for the O.P.P. to have her removed from the home. She stayed in the shelter for a month but never filed a complaint with the police. The parties reconciled and she moved back to Santa's Village Rd.
- [9] The parties attended couples therapy with Peter Gelderbloom in Huntsville and the respondent attended with a personal therapist Tom Walkling. Both these therapists were funded as part of the benefits accruing to the respondent through the Gouge Commission. However according to the applicant the respondent's problematic behaviour and drug use continued to escalate.
- [10] On September 6, 2013 the applicant made a formal complaint to the O.P.P. However charges have yet to be laid. On September 10, 2013 the applicant applied ex parte for a restraining order which was granted. That order has since been extended indefinitely on consent.
- [11] The respondent has elected not to file an answer in the family law proceedings as he does not wish to be found to have attourned to the jurisdiction of the Family Court. As a result of that decision, I have no material before me dealing with the applicant's allegations of his drug use and abuse. I make no findings with respect thereto as there is no need to do so at this time. I do note however that there is independent evidence of the fact that there was conflict in the relationship and that the parties sought and attended counselling for it.

- [12] The applicant's original application dated September 10, 2013 sought only a restraining order. On November 1<sup>st</sup>, 2013 the respondent commenced a civil action in Toronto CV-13-00492026-0000 seeking damages for fraud, fraudulent misrepresentation, a declaration that the applicant's relationship with the respondent was solely motivated by a desire to benefit financially, and ancillary relief including a sale of the properties.
- [13] On December 5<sup>th</sup>, 2013 the applicant filed an amended application seeking a sale of the jointly owned properties, damages for abuse, support, and consolidation of the respondent's civil action with this action. The applicant then scheduled a case conference for January 30, 2014 which the respondent and his counsel elected not to attend, sending instead, an agent to argue for an adjournment.
- [14] Since September 10, 2013 the respondent has been excluded from the Santa's Village Rd. property through the operation of the restraining order. The Stahl's Rd property remains rented out. The respondent has been staying in Sault Ste. Marie where he has family. The applicant has been collecting the rent from the Stahl's Rd. property from which she has been paying taxes and insurance for that property and all expenses for the Santa's Village Rd. property. The respondent has been servicing a line of credit on the Stahl's Rd property. It appears that this arrangement is keeping all expenses current for both properties. Both parties have indicated through counsel that they are content to continue the arrangement for the time being.
- [15] The first matter to be determined is whether this action should be either dismissed or stayed pending the outcome of the Toronto action. The respondent's position is that his action was the first out of the gate on the issues of monetary compensation. The applicant's family law proceeding although filed first sought only a restraining order. It was not until the applicant retained counsel to defend the respondent's tort action that she amended the family law proceedings to seek support, partition and sale of jointly owned property and damages for abuse. The respondent argues correctly, that the damage claim duplicates the issue raised in his action and that a multiplicity of actions over the same issues should be avoided. He further argues that to amend the family law action after the commencement of tort action is an abuse of process.
- [16] The applicant replies that she was self-represented when she began the family law application. She points out that as soon as she was represented negotiations began between her counsel and the respondent's former counsel to settle the family law claims including the dispositions of the two properties. She argues that it was the respondent who sought other counsel and began a second action during the course of these negotiations in the full knowledge that the family law pleadings were going to be amended if no settlement was reached. She therefore argues that she properly amended her application to deal with the jointly owned property and the issue of support. Her claim for damages in the family law action and the respondent's similar claim in the tort action can be dealt with, in her submission, by consolidating the two actions.
- [17] While I agree with the respondent's self-evident argument that there should not be two proceedings dealing with the same parties and issues, his conclusion that the amendment of the family law action is an abuse of process and should therefore be stayed pending the

outcome of his tort action flies in the face of that very argument. The tort action by its nature precludes an examination of a number of issues that arise out of the fact that these parties were a couple for more than three years. They got engaged, blended their finances, owned property together, had conflicts, and attended couples counselling to attempt to deal with their difficulties. In short their relationship was that of a couple.

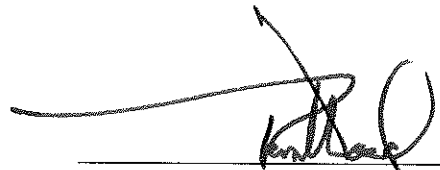
- [18] It follows that the damages claimed by each side arose in the family law context and should be dealt by the Family Court which was created precisely to resolve disputes arising as a result of the breakdown of relationships, and has an expertise in the area. The respondent's contention that the parties' three years of co-habitation was entirely a sham based on a false promise made by the applicant to the respondent flies in the face of all the evidence. While there may have been some element of economic consideration in the applicant's decision to accept the respondent's proposal of marriage, that issue must be decided in the context of their life together as a couple-that is to say in the family law context.
- [19] To stay the family law action would, whatever the outcome of the tort action, leave such issues as support unresolved. This would result in the renewal of the family law proceedings causing the very multiplicity of actions both counsel wish to avoid. A consolidation of the actions on the other hand, would allow a full examination of each party's claims both for damages and for relief under the *Family Law Act*. Therefore I find that the two actions should be consolidated within this Family Law proceeding.
- [20] The question of where to try the consolidated action now arises. The respondent has argued strongly that the false promise upon which his tort action is based occurred in the Kitchener area and that there is therefore no natural connection to Muskoka. The applicant responds that the Muskoka action was commenced first, albeit incompletely. The parties both lived in Muskoka at the time it was commenced. They continue to own two residential properties in this area. Many of the witnesses to the nature of their relationship will come from Muskoka. Those that do not will come from Sault Ste. Marie. The only connection to Toronto is the address of the respondent's lawyer. I find the applicant's points compelling. The balance of convenience favours Muskoka. The case will proceed in this area.
- [21] My rulings on the preliminary issues of procedure entitle the applicant to proceed with the interim relief sought in her motion. There are four heads to this relief. She seeks interim spousal support, an advance on disbursements, an order compelling the production of counselling records for the respondent, and a prohibition on further hostile electronic postings being made to and about her by the respondent.
- [22] During the course of argument at my request, counsel for the applicant reviewed the present income sources of the applicant and her expenses while she remains in the Santa's Village Rd. property. As outlined in paragraph (15) above the applicant collects the rent from Stahl's Rd. and uses it to pay some of that property's costs and all of the Santa's Village Rd. costs. When this is done there is a small surplus which corresponds roughly to the applicant's suggested interim support amount. The parties have confirmed

that they are content with this arrangement for the time being. There is therefore no need for an award of interim spousal support.

- [23] The applicant seeks an advance on disbursements to pay a retainer for her counsel and to fund a psychological report commissioned to document the trauma which forms the basis of her claim for damages. Under rule 24(12) of the *Family Law Rules* the court may make an order that one party pay a sum of money to cover the expenses of another party including legal fees.
- [24] This provision may be used by the court to “even the playing field” where the following conditions are present. The assets or income of one party are so low that he or she cannot afford to carry on the litigation. The assets or income of the other party are such that he or she can afford the advance. And there is some reasonable expectation that the outcome of the litigation will result in a payment to the party seeking the advance equal to or more than its amount.
- [25] At this stage of the proceedings, I am satisfied that the applicant can establish her need. She has a very low monthly income. The funds she derives from the rental of Stahl’s Rd are almost entirely required to maintain the parties’ two properties. Therefore there is no money available to fund this hard fought litigation.
- [26] However the respondent’s ability to pay is unknown. Although it is clear that he has a substantial asset in the form of his settlement, it is apparently structured to some extent and his ability to make a withdrawal of capital beyond his monthly allowance is unknown. While this lack of knowledge stems entirely from the respondent’s refusal to file financial information, that matter will be rectified as a result of the outcome of these motions.
- [27] Based on the evidence before me on these motions I am satisfied of the likelihood of some recovery by the applicant from the respondent either for support, or damages, or for her interest in the jointly held properties. I conclude therefore that some advance is appropriate. For the time being the matter can best be resolved by a limited order with the right to the applicant to renew her request at a later date if necessary once financial disclosure has been made. Accordingly I order the respondent to advance the sum of \$10,000.00 to counsel for the applicant within 45 days of the date of this order for expenses of the litigation.
- [28] As I indicated to counsel during argument I decline to deal with the last two heads of relief sought by the applicant. Production of the counselling records may well raise confidentiality concerns and any motion for their production should be made on notice to the authors of those records. The Facebook entries may well expose the respondent not only to a libel action but also to a charge that he is in violation of the present restraining order prohibiting all communication either direct or indirect. Counsel for the respondent has indicated that he has “spoken to” his client about Facebook. Hopefully that will be sufficient to put a stop to the nonsense.

[29] Order to go as follows:

- (1) The respondent's motion for a dismissal or stay of this action is dismissed.
- (2) Toronto action # CV-13-00492026-0000 is consolidated with this action under this actions number and is transferred to the District of Muskoka for that purpose.
- (3) The statement of claim in action # CV-13-00492026-0000 shall be deemed to be the respondent's answer in this action.
- (4) The respondent shall serve and file a financial statement including full details of his structured settlement and his ability to access funds from it, within 30 days of the date of release of this order.
- (5) The respondent shall advance the sum of \$10,000.00 uncharacterised to counsel for the applicant for expenses within 45 days of the date of release of this order, without prejudice to the applicant's right to seek such further advances upon production of the respondent's financial material.
- (6) In accordance with the Superior Court of Justice Protocol on movement of files between regions, clause (2) will come into effect upon the consent of the Regional Senior Justices of the Toronto and Central East Regions of the Superior Court of Justice. For the purpose of obtaining that consent the motion material and a copy of these reasons are to be sent to the Office of the Regional Senior Judge for Central East forthwith. All other clauses of this order take effect immediately.
- (7) The parties may submit written cost submissions within 30 days of the date of release of this order

  
Justice T.M. Wood

**Released:** March 3, 2014