CITATION: Arbuckle v. Arbuckle, 2019 ONSC 7453
COURT FILE NO.: 272-15
DATE: 2009 12 20

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Krista Elizabeth Arbuckle,

Applicant

-and-

John David Arbuckle

Respondent

BEFORE: Lemon J.

COUNSEL: James B.C. Edney, counsel for the applicant
Gary S. Joseph, counsel for respondent

Heard: December 3, 2019

RULING

The Issue

[1] Ms. Arbuckle moves for an order directing the parties' mediator to produce his mediation notes from May 2, 2019, to both parties.

History

[2] The parties separated in 2012 and have been litigating their issues since 2015.

[3] To their credit, they have agreed to mediate the issues on two occasions. The first occurred in 2016. Although an agreement was reached, the litigation continued. Ms. Arbuckle pleads that Mr. Arbuckle failed to disclose significant financial information. Mr. Arbuckle denies this.

[4] That dispute led to a summary judgment motion, which was heard in February of 2019. Mr. Arbuckle moved to enforce the terms of the 2016 settlement and that motion was dismissed.

[5] Again, to the parties' credit, they attended another mediation in May 2019. Ms. Arbuckle submits that the parties settled all of the outstanding issues at that mediation. Mr. Arbuckle denies this.

[6] Ms. Arbuckle now wishes to bring a summary judgment motion enforcing the terms of that alleged settlement. To support that motion, she wishes to see the mediator's notes. The mediator has refused to produce those notes without the consent of both parties, or a court order. Mr. Arbuckle does not consent.

Position of the Parties

[7] It is undisputed that the mediator takes no position regarding the motion.

[8] Although both parties produced voluminous materials, their positions boil down to the following.

[9] Ms. Arbuckle sets out in her affidavit that:

> 43. As a result of John's intransigence, I have been left with no choice but to resume the litigation, and take steps to enforce the settlement that was achieved at Mediation. Prior to scheduling of a Summary Judgment Motion however, I require the production of Mr. Fogelman's notes from the mediation session as they constitute proof of the settlement that was achieved between John and me on May 2, 2019.
>
> ...
>
> 50. I believe that the production of Mr. Fogelman's notes will further substantiate that there was a meeting of the minds, and that we have a binding settlement, notwithstanding John's dissatisfaction with same, after the fact. Upon the production of Mr. Fogelman's notes, I Intend to proceed with the scheduling of a Summary Judgment Motion and request the Court's assistance with respect to same.

[10] In response, Mr. Arbuckle states:

> 4. The Applicant has admitted, at paragraph 7 of her affidavit, that she is seeking Mr. Fogelman's notes as evidence to bring a Summary Judgment Motion to enforce the alleged "agreement" reached at Mediation with Mr. Fogelman. Briefly stated, there was no agreement reached at Mediation with Mr. Fogelman, and I am not bound by our settlement discussions. Based on the history of our proceedings, as I will discuss in detail below, it is alarming that Krista would attempt to bind me to terms which first, do not consider my performance of our earlier signed Minutes of Settlement nor her default thereunder, and second, require me to pay an amount of support that I am unable to afford and did not agree to.
>
> 5. I believe that Mr. Fogelman's notes are subject to privilege that I am entitled to when engaged in settlement discussions. The release of his notes will prejudice me for the following reasons. The income for support purposes used in our discussions vastly overstate what is affordable to me. More importantly, I am also concerned that the

production of Mr. Fogelman's notes will incentivize Krista to attempt to bind me to terms which are unfavourable to me, and that I did not and am not in agreement of.

6. There were several problems with Mediation with Mr. Fogelman. First, we did not execute a mediation agreement before the mediation took place. It was not brought to my attention when we attended. Had I known I would not have engaged in the process.

7. Second, Krista did not swear an updated financial statement before the Mediation with Mr. Fogelman.

8. Third, I did not sign any agreement with Krista at the Mediation. I did not believe that a change in support was necessary and the numbers we were discussing did not consider the fact that I was in a much different financial position following my transfer of assets to Krista. I did not understand how my previous performance of obligations following marriage breakdown (as codified in our Minutes of Settlement) were not considered. I left mediation with significant concerns about our discussions. I visited my accountant, Mike Adnison, who confirmed my view that withdrawing $14,000 per month in spousal support would not be viable for my company. My counsel wrote to Krista's counsel, Mr. Edney, explaining my circumstances and I would not be moving forward with any settlement based on our discussions.

...

66. I did not intend for the discussions at mediation to be binding. My prior experience with Mr. Epstein had well informed me that there is no deal until a deal is signed. I am concerned by Krista's position in these proceedings and that she is attempting to again prejudice me.

67. Ms. Hansen informed Mr. Edney that I would not be moving forward with our discussions. We were going to wait until the 2019 Quorum financials were released before I approached negotiating again. He refused to accept this and insisted on binding me to our discussions. Had Mr. Edney or even Mr. Fogelman felt a deal had been reached, why was it not codified in writing as Mr. Epstein had done? All of the counsel involved are extremely experienced family

lawyers, yet all left the mediation without a piece of paper being signed, without a memo being drafted without any exchange in writing.

68. I ultimately decided to self-represent until recently retaining my current counsel. The letters exchanged between Mr. Edney and I are a reflection of my fear that Krista was again going to attempt to use the court processes to penalize me. I am not a lawyer and did the best I could with my responses to him. Krista wants to new bind me to terms which I am in no means in agreement of. The production of Mr. Fogelman's notes will not bring about a just resolution to our case.

Authorities

[11] The importance of settlement privilege is described by the Supreme Court of Canada in *Bombardier Inc. v. Union Carbide Canada Inc.,* 2014 SCC 35, [2014] 1 S.C.R. 800, at para 31 as follows:

> Settlement Privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming…

[12] In *Rudd v. Trossacs Investments Inc.*, 2006 CanLII 7034 (Ont. Div. Ct.), at para. 39, the Court recognized that there was an important public

interest in protecting the confidentiality of the mediation process that outweighed the interest in compelling the evidence of the mediator.

> The ability of parties to engage in full and frank disclosure is fundamental to the mediation process and to the likelihood that it will lead to resolution of a dispute. There is a danger that they will be less candid if the parties are not assured that their discussions will remain confidential, absent overarching considerations such as the revelation of criminal activity.

[13] In *Children's Aid Society of London & Middlesex v. B. (C.D.)*, Justice Harper wrote that mediation privilege should "never be set aside lightly. It must only be done when the balance of ensuring the integrity and fairness of the litigation at hand commands it to be done": 2011 ONSC 5853, [2011] O.J. No. 5526, at para. 28.

[14] In this case, however, Mr. Arbuckle concedes that:

> Common law exceptions to settlement privilege have developed where it is reasonable and necessary for disclosure. Some examples include:
> - Where there has been fraud;
> - Where production is necessary to meet a defence of laches;
> - Lack of notice or the passage of a limitation period;
> - Or where parties have made an agreement respecting evidence in the litigation.

[15] With respect to agreements, in *Bombardier,* the Supreme Court went on to say, at para 35:

> The exception to settlement privilege at issue in the case at bar is the rule that protected communications may be disclosed in order to

prove the existence or scope of a settlement. This exception is explained by Bryant, Lederman and Fuerst:

> If the negotiations are successful and result in a consensual agreement, then the communications may be tendered in proof of the settlement where the existence or interpretation of the agreement is itself in issue. Such communications form the offer and acceptance of a binding contract, and thus may be given in evidence to establish the existence of a settlement agreement. (citing A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at para. 14.340)

The rule is simple, and it is consistent with the goal of promoting settlements. A communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement. Once the parties have agreed on a settlement, the general interest of promoting settlements requires that the parties be able to prove the terms of their agreement. Far from outweighing the policy in favour of promoting settlements, the reason for the disclosure — to prove the terms of a settlement — tends to further it. The rule makes sense because it serves the same purpose as the privilege itself: to promote settlements.

Analysis

[16] It is important to note that the request is only for production of the mediator's notes to both parties. I am not ruling as to the admissibility of these documents, nor am I ruling on whether a settlement was, in fact, reached. Those are issues for another day, if a summary judgment motion is brought.

[17] Again, the mediator has not taken a position on the motion.

[18] Ms. Arbuckle attached correspondence from the mediator. Mr. Arbuckle disputes the admissibility of some of the statements made by the mediator. He rightly disputes the admissibility of that evidence from a witness without a sworn affidavit. While I agree with Mr. Arbuckle on that point, the only thing that I take from the mediator's correspondence is that he does not dispute this motion. Neither party denies that proposition.

[19] Both parties agree that no mediation agreement was signed. There is no contractual term that prevents the production of these records.

[20] Although the summary judgment motion judge ordered that there would be no further motions without leave, Mr. Arbuckle did not argue that leave should not be granted. In the circumstances, that seems sensible. If necessary, in these circumstances, I grant leave to bring this motion.

[21] The parties' present dispute is whether an agreement was reached before the mediator on May 2, 2019. Mr. Arbuckle has set out a number of concerns about the mediation and denies that any agreement was reached. But this motion is not to determine whether there was an agreement or not, it is only to determine whether the notes are *producible*.

[22] Given that dispute, it appears that the notes of the mediator would be relevant. Producing those notes would benefit both parties and their

respective arguments as to whether or not an agreement was reached. Upon production, the parties may soon take different positions on relevance or admissibility.

[23] Following the authorities put forward by Mr. Arbuckle, the notes may well be relevant to the issue of whether the case is settled or not.

Ruling

[24] Accordingly, I order that the mediator's notes from the May 2, 2019, meeting shall be produced to both parties.

Future Steps

[25] On February 6, 2019, Peterson J. made a number of orders arising from the summary judgment motion. For simplicity, I repeat them here:

> 26. Pursuant to Rule 16(9) of the *Family Law Rules*, in the interest of expediting the resolution of this matter, I made the following orders:
>
> (a) Ms. Arbuckle will have 30 days from the date of this Endorsement to serve and file an Amended Application.
> (b) Mr. Arbuckle will have 30 days from the date of receipt of her Amended Application to serve and file an Amended Answer.
> (c) No further motions will be brought by either party without leave of the Court, unless they are brought on consent.
> (d) The parties' counsel will communicate with each other with a view to (1) identifying any remaining steps required to advance this matter to trial, (2) establishing a timetable for the completion of those steps and (3) scheduling a Trial Management Conference with the Court as soon as practicable.

(e) The parties will endeavour to salvage what they can from the motion record in order to shorten the hearing and attenuate wasted motion costs. They should consider, for example, the use of existing affidavits as the parties' evidence-in-chief and the submission of expert reports as the expert witnesses' evidence -in-chief, subject to a right of cross-examination by the opposing party at trial. They should turn their minds to other time-saving and cost-saving measures.

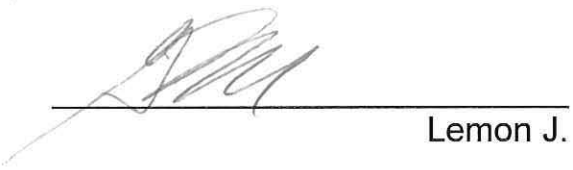
(f) If the parties are unable to reach agreement on a litigation timetable and steps to expedite the matter by March 15, 2019, either party may request an order imposing a timetable and/or directions on how the trial will proceed. This can be done by scheduling either a teleconference with me or a special appointment before me. Such a request should be made in writing, with a copy to the opposing party, addressed to the attention of my judicial assistant at xxx.ca. As the summary motion judge, I have familiarity with the file. The insight gained during the summary motion hearing can be instrumental in crafting a trial procedure that is sensitive to the complexity and importance of the issues, the amount involved in the case, and the effort expended by both parties on Mr. Arbuckle's failed summary judgement motion: *Hryniak*, at para. 76-77. However, scheduling complexities in the Central West Region militate against me remaining seized as the trial judge.

[26] Nothing in my endorsement should be taken to relieve the parties from their obligation to comply with that order.

[27] While I have proceeded with this motion, any further motions, including with respect to the admissibility of these documents and Ms. Arbuckle's proposed summary judgment motion, will still require leave.

Costs

[28] If costs cannot be agreed upon, Ms. Arbuckle shall deliver written submissions within 20 days. Mr. Arbuckle shall deliver responding submissions within 15 days thereafter. There shall be no reply submissions unless I request them. Each submission shall be no more than three pages not including any offers to settle or bills of costs.



Lemon J.

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