

2014 ONSC 4677
Ontario Superior Court of Justice

Joshi v. Joshi

2014 CarswellOnt 12591, 2014 ONSC 4677, 244 A.C.W.S. (3d) 432

**Sharmishtha Joshi, Chandrakala Joshi, Mahendra Joshi,
Minakshi Dave, Narendra Joshi and Yogendrakumar
Joshi, Plaintiffs and Elaxi Ben Joshi, Respondent**

Carole J. Brown J.

Heard: August 12, 2014
Judgment: August 13, 2014
Docket: CV-13-492389

Counsel: Jonathan Kulathungam, for Plaintiffs
Dennis VanSickle, for Defendants

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Judgments and orders — Consent judgments or orders — Setting aside
Under consent order, respondent was required to vacate house on specified date — Respondent did not want to move until house sold — Respondent brought motion to set aside or vary consent order — Motion dismissed — There was no basis to set aside or vary consent order — Order was negotiated between parties and their counsel over three days and agreed upon by respondent — While respondent indicated that, prior to agreeing to order, she was concerned about fact that she may have to move before house sold, she still provided executed consent to order — Order was clear, unambiguous, and detailed — Order clearly set forth date for respondent to provide vacant possession — There was no credible evidence of fraud, that order did not reflect parties' intentions, material changes in circumstance or misrepresentation — Respondent's arguments regarding frustration of contract, implicit incorporation of prior order and that she could not afford rental accommodation were not persuasive — Order was final and binding and should not be varied in absence of extraordinary factors.

MOTION by respondent to set aside or vary consent order.

Carole J. Brown J.:

1 The moving party respondent moves pursuant to Rule 59.06 to set aside or vary the consent order of A. O'Marra J. dated April 25, 2014. In fact, the moving party seeks to vary the order as regards the vacating of the premises on August 23, 2014, given that the house has not, to date, sold. She does not wish to move from the home until the house sells.

2 The parties have produced voluminous materials and have referred me to transcripts of cross-examination of the parties. They have further referred me to case law relevant to this motion.

3 It is the moving party's position that the responding parties have failed to comply with the order as regards disclosure and thereby, in essence, frustrated the order, that the consent order must be read in light of the previous order of Croll J. in the family law action, which has not been complied with as regards disclosure and that material circumstances have changed, justifying the varying or setting aside of the order.

4 It is the position of the responding party that, pursuant to Rule 59.06, the discretion to set aside an order must be exercised judiciously. The responding party argues that the moving party has not established any grounds on which to set aside the consent

order. Further, as regards any failure to disclose, the responding party argues that it is the moving party which has failed to respond in order that examinations can occur.

5 As stated in *Mohammed v. York Fire & Casualty Insurance Co.* (2006), 79 O.R. (3d) 354 (Ont. C.A.), at paragraph 34-35:

Minutes of settlement are a contract. A consent judgment is binding. Both are final, subject to reasons to set them aside. Finality is important in litigation. This is so for the sake of the parties who reached their bargain on the premise of an allocation of risk, and with an implicit understanding that they will accept the consequences of their settlement. Finality is also important for society at large, which recognizes the need to limit the burden placed on justice resources by relitigation, a limitation reflected in the doctrine of *res judicata*: See *Tsaoussis (Litigation Guardian of) v Baetz* (1998), 41 O.R. (3d) 257, [1998] O.J. No. 3516, 165 D.L.R. (4th) 268 (C.A.), at paras. 15, 17, 18.

For these reasons, the avenues to set aside a settlement and consent dismissal are restricted. Rule 59.06 sets out the procedure for setting aside such an order. It provides that a party may bring a motion in the original proceeding to "have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made".

6 Based on the jurisprudence, in order to set aside a consent order, there must be proven grounds of common mistake, misrepresentation, fraud, or any other ground which would invalidate contract or, alternatively, a material change in circumstance occurring after the consent order: *Gibson v. Gibson*, [2002] O.J. No. 1784 (Ont. S.C.J.) paras. 15-16; *Masters v. MIS International Inc.*, [2000] O.J. No. 3524 (Ont. S.C.J.) and see *Rosen v. Rosen*, [1994] O.J. No. 1160 (Ont. C.A.).

7 Based on all of the evidence before me and the submissions of counsel, there is no basis on which to set aside or vary the Consent Order of A. O'Marra J. dated April 25, 2014 and negotiated between the parties and their counsel over three days (April 22-24), and, pursuant to the moving parties cross-examination on her affidavit, agreed upon by her. While she indicated that, prior to agreeing to the Consent Order, she was concerned about the fact that she may have to move out before the house sold, she nevertheless, following negotiations on this issue, consented and provided an executed consent to the order, including the term that she move from the home by August 23, 2014.

8 The order is clear, unambiguous, and detailed. It clearly sets forth the date for the moving party to provide vacant possession. There is no credible evidence of fraud, no credible evidence that the order does not reflect the parties' intentions, no evidence of material changes in circumstance following the consent order sufficient to set aside or vary the consent order, nor any evidence of misrepresentation sufficient to permit this Court to vary or set aside the order. I do not find the moving party's arguments as regards frustration of the contract, or implicit incorporation of the order of Croll J. persuasive. Nor do I find the argument that the moving party will be "homeless" and cannot afford rental accommodation if she is required to move persuasive.

9 A consent judgment is final and binding and should not be varied in the absence of extraordinary factors.

10 The Consent Order of A. O'Marra J. dated April 25, 2014 stands and the moving party is to comply fully with the Consent Order.

11 Based on the costs outlines submitted by the parties, the responding party to this motion seeks its costs on a partial indemnity basis. I grant costs in the amount of \$21,000 all inclusive.

Motion dismissed.