

Court of Queen's Bench of Alberta

Citation: Breitkreuz v Breitkreuz, 2021 ABQB 339

Date: 20210428
Docket: 4803 130530
Registry: Edmonton

Between:

Monica Lynn Breitkreuz

Plaintiff/Respondent

- and -

Alan Dale Breitkreuz

Defendant/Applicant

**Reasons for Decision
of the
Honourable Mr. Justice James T. Neilson**

[1] The Defendant, Applicant, Alan Dale Breitkreuz (“Applicant”) applies to set aside four Orders of the Court of Queen’s Bench that were issued in these proceedings in 2019. The application is brought pursuant to Rule 9.15. The Applicant asserts that he did not have notice or sufficient notice of the applications resulting in these Orders.

[2] Rule 9.15(1) provides that:

(1) On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made

(a) without notice to one or more affected persons, or

(b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing.

- (2) Unless the Court otherwise orders, the application must be made within 20 days after the earlier of
- (a) the service of the judgment or order on the applicant, and
 - (b) the date the judgment or order first came to the applicant's attention.

[3] Rule 9.15 (4) provides as follows:

- (4) The Court may set aside, vary or discharge an interlocutory order
- (a) because information arose or was discovered after the order was made,
 - (b) with the agreement of every party, or
 - (c) on other grounds that the Court considers just.

[4] The Applicant seeks to set aside the following Orders:

- a) Ex parte substitutional service order pronounced on May 2, 2019 by Master W. S. Schlosser;
- b) Order pronounced on June 13, 2019 by myself, Justice J. T. Neilson;
- c) Order pronounced on July 3, 2018 by Justice V. O. Ouellette;
- d) Order pronounced on December 18, 2019 by Justice R. A. Graesser

Procedural History

[5] Monica Lynn Breitreuz ("the Respondent") filed a Statement of Claim for Divorce and Division of Matrimonial Property in these proceedings on February 19, 2004. This claim was served personally on the Applicant on April 5, 2004 at his place of residence, 320, 17 Street SW Edmonton, Alberta. This has remained the Applicant's residential address throughout.

[6] The Applicant was noted in default on July 8, 2004. A Divorce Judgment and Corollary Relief Order (without Oral Evidence) was granted on December 4, 2004, the Applicant having been noted in default.

[7] On February 2, 2006, the Respondent filed an application with supporting affidavit for an order for partition and sale of the matrimonial home. The Applicant's then solicitors ceased to act on May 23, 2006. On July 10, 2006, the Court granted an Order for partition and sale of the matrimonial home, registered in the name of both parties. The property was partitioned from a joint tenancy to a tenancy in common each as to a one half undivided interest. The Order also provided for the removal of contents from the matrimonial home by the Respondent, to have the home appraised, to list the home without the requirement of the Applicant's consent and to accept any offer which is not less than 85% of the appraised value.

[8] No steps were taken to follow through with the partition and sale order. The Respondent deposes that she had been in ill health and did not want to have the matrimonial home sold while their two children continued to live there with their father.

[9] The Respondent moved to Calgary in 2008 and there had been virtually no communication directly between the parties. The Divorce Judgment provided that the Applicant pay to the Respondent spousal support in the amount of \$750 a month and these payments have been made through the Maintenance Enforcement Program.

The Substitutional Service Order

[10] In early 2019, the Respondent considered that it was time to revisit spousal support payable by the Applicant. She retained counsel who filed a Notice to Disclose/Application on March 29, 2019. Respondent's counsel retained a process server to serve the Notice to Disclose/Application personally on the Applicant. The process server was unable to effect personal service and prepared an Affidavit in support of an ex parte application for a substitutional service order.

[11] The governing rule for substitutional service is Rule 11.28, which provides as follows:

11.28(1) If service of a document, inside or outside Alberta, is impractical, the Court may, on application, make an order for substitutional service.

(2) The application must be supported by an affidavit

(a) setting out why service is impractical,

(b) proposing an alternative method of service, and

(c) stating why the alternative method of service is likely to bring the document to the attention of the person to be served.

(3) Unless otherwise ordered, an order for substitutional service of a document must be served with the document except when substitutional service is by advertisement, in which case the advertisement must contain a reference to the order.

(4) If a document is served in accordance with an order for substitutional service, service is effected on the date specified in the order.

[12] Because an application for substitutional service is made ex parte, it is important that the affidavit in support meets the requirements of Rule 11.28. As the Alberta Court of Appeal stated in *Hansraj v Ao*, 2004 ABCA 223 at paragraphs 77 and 78:

[77] Rule 23 [now Rule 11.28] is not a formality. Substitutional service is not a way of dispensing with service, nor a legal fiction. Substitutional service does not dispense with service; it replaces personal service with some other method likely to come to the personal attention of the defendant in question.

[78] An order cannot be made (or upheld) under R. 23, unless there is evidence to show that the statement of claim is likely to reach the defendant or come to his attention, if the proposed method of service is used...

[13] In this case, the process server, Cameron Leat deposed as follows in his affidavit sworn on April 17, 2019 concerning his attempts at personal service of the Notice to Disclose/Application on the Respondent at 320, 17 Street SW, Edmonton, Alberta:

2. On the 5th day of April, 2019, I attended at the above address where I found the front of the property, to have a security gate and padlocked and no way to enter premises. At this time I observed a black truck parked on the premises. I called a cell number, but received no answer.
3. On the 8th day of April, 2019, I again attended at the above address where I was unable to gain entrance to the property. At this time I observed no black truck parked at the premises. Again, I telephoned the cell number but received no answer to my call.
4. That my office received information from TC Family Law informing me that Mr. Breitreuz would be at Rosie's restaurant on Whyte Avenue, Edmonton, Alberta for brunch on April 13, 2019 at around 7:45 am.
5. At approximately 7:45 am, on Saturday, April 13, 2019, I attended at Rosie's and waited until after 8:00 am, but was unable to locate the above named Defendant. At this time, I checked for black trucks parked in the parking lot, located five, but wasn't able to tell which one could have been the Defendant's.
6. At approximately 10:45 am, I attended at the Defendant's residence, where I noticed a black truck parked on the premises. I called the cell, but received no answer. Again, on the above date, at approximately 4:15, I attended at the residential address, where I observed no black truck at the residence. I yelled and honked my horn to try and get some attention, but was unsuccessful in doing so.
7. Due to the circumstances involved, it would be impractical to serve Alan Dale Breitreuz, promptly and personally with the above named documentation, in this action.
8. I make this Affidavit in Support of an Application for an Order for Substitutional Service of the Notice to Disclose/Application filed March 26, 2019 and Notice of Change of Representation, filed March 26, 2019 and all documents pertaining to this action, by leaving with any adult, or in the alternative by placing a copy of the documentation in a sealed envelope, addressed to the Defendant and affixing to the front security gate at 320, 17th Street, SW, Edmonton, Alberta.
9. That I verily do believe that within a period of time, the documents will come to the attention of the Defendant, Alan Dale Breitreuz, giving him good and sufficient notice of the action against him.

[14] On May 2, 2019, Master W. S. Schlosser issued the ex parte order for substitutional service, having read the affidavit of attempted service, sworn on April 17, 2019. The Order provides as follows:

1. The Plaintiff shall be liberty to substitutionally serve the Defendant, Alan Dale Breitreuz, with a copy of the Notice of Change of Representation and Notice to Disclose Application, along with a copy of this Order in this action affixing a copy of the said documents in a sealed envelope

addressed to the Defendant to the gate of the primary entrance of the premises located at 320, 17th Street, SW, Edmonton, Alberta T6X 1A7.

2. Service upon the Defendant in this manner shall be deemed effective two days after the documents are posted pursuant to paragraph 1 of this Order.
3. That the Plaintiff is at liberty to serve all subsequent documentation in this matter upon the Defendant in the aforementioned manner.
4. That the Plaintiff shall be entitled to costs of this application.

[15] The process server subsequently prepared an affidavit confirming that the Notice to Disclose Application had been placed in a sealed envelope at the gate to the aforementioned residence, taking a photograph of it.

[16] I find that the affidavit in support of the Order for Substitutional Service adequately set out why service was impractical at the time, proposing an alternative method of service, and stating why the alternative method of service is likely to bring the document to the attention of the person being served. The residential address of the Applicant remained, as it has been throughout these proceedings, at 320, 17 Street, SW Edmonton, Alberta, T6X 1A7.

Substitutional Service of Subsequent Proceedings

[17] On June 13, 2019, I granted an Order (“the Neilson Order”) that the Applicant shall provide his complete financial disclosure by June 27, 2019, failing which he shall attend personally on July 3, 2019 at 2:00 pm in Chambers to show cause why he should not be held in contempt.

[18] The Neilson Order was served substitutionally in accordance with the Order of Master Schlosser.

[19] No one appearing on July 3, 2019 as ordered, Justice V. O. Ouellette declared the Applicant to be in contempt of the Neilson Order, and a warrant was issued accordingly.

[20] A further application was made by the Respondent, served substitutionally on November 30, 2019 and effected December 2, 2019. On December 18, 2019 Justice R. A. Graesser granted an Order changing the legal description of the property in paragraph one of the original Partition and Sale Order dated July 10, 2006, and furthermore ordered payment of spousal support in the amount of \$2000 per month beginning January 1, 2020.

[21] The Applicant deposes that he was unaware of any of the steps in these proceedings against him until January 2020, when he was detained at the airport on his way to Phoenix, Arizona, pursuant to the warrant issued by the Order of Justice Graesser in July 2019.

[22] The Applicant deposes that he retained counsel who ordered a copy of the proceedings recorded in the clerk’s office, then notified Respondent’s counsel on March 20, 2020 of his intention to bring an immediate application to set aside the previous orders. The Court did not consider the proposed application to be urgent in the context of the pandemic restrictions then imposed. The Application was finally heard in special chambers on April 19, 2021.

[23] The Applicant deposed that he was unaware of any of the proceedings against him until getting access to the clerk’s records in March 2020. It had been the arrest at the airport in January 2020 which had prompted him to seek legal counsel. He deposes that he was unaware of anyone trying to contact him personally by telephone or email at his place of work. He denies

that the process server posted the court documents at his residence, and deposed that he may have posted documents to the wrong address, namely his neighbour's.

[24] The Applicant was questioned on the two affidavits he swore in support of the application to set aside the four Orders. The three affidavits of Substitutional Service dated April 17, 2019, June 17, 2019 and December 1, 2019 were put to him. Each affidavit attached a photograph of an addressed manila envelope, one taped to the North gate entrance and two taped to the South gate entrance to the property. The Applicant admitted that the photographs showed the entrance to his property. Each affidavit identified the documents that were contained in each of the addressed manila envelopes.

[25] The Applicant's daughter Julia had sent a text to the Applicant on June 16, 2019, stating "looks like there's something o the gate". The Applicant deposed that he was at the lake at that time and didn't return home until later that evening.

[26] The Applicant had to gain access to his residence through the front gates. I find that the posted documents would have been visible and apparent to him, or alternatively, that the Applicant chose to ignore them. I find that the Notice to Disclose/Application and the subsequent Orders were effectively served substitutionally in accordance with the Order of Master Schlosser.

The Civil Contempt Order

[27] There is a complaint that the Order requiring the Applicant to appear to explain why he should not be held in contempt, and the Order citing him in contempt when he failed to appear, ought to have been served personally pursuant to Rule 10.52, given the serious consequence that could follow from an order citing a party in civil contempt. However, it is conceded by the Respondent that the Orders of Justice Neilson and Justice Ouellette are now moot. However, the costs awarded by the Court in those two Orders remain payable. The Substitutional Service Order and the Order of Justice Graesser are not set aside.

The Partition and Sale Order is In Force and Effect

[28] The Applicant contends that the Partition and Sale Order issued in 2006 is no longer in force and effect, citing section 27 of the *Civil Enforcement Act* RSA 2000, c. C-15. Section 27 provides as follows:

27(1) A writ is in force only while the judgment in respect of which the writ is issued is in force.

(2) For the purposes of subsection (1), a judgment is not in force

(a) if it has been satisfied, or

(b) on the expiration of 10 years from the day that the judgment takes effect unless the judgment is renewed or an action is brought on that judgment within the 10-year period.

[29] The Applicant contends that the Partition of Sale Order was not renewed within the 10-year period following its issuance. However, in reviewing the provisions of the *Civil Enforcement Act*, the legislation relates to the enforcement of money judgments, which the Partition and Sale Order is not.

[30] The following definitions in the *Civil Enforcement Act*, section 1, must be considered:

1(z) “judgment” includes any order, decree, duty or right that may be enforced as or in the same manner as a judgment of the Court;

(ff) “money judgment” means a judgment requiring a person to pay money or that part of a judgment that requires a person to pay money;

(uu) “writ proceedings” means any action, step or measure authorized by this Act to be taken for the purpose of enforcing a money judgment.

[31] Section 2 of the *Civil Enforcement Act* provides:

(a) except as otherwise provided for in another enactment,

(i) a money judgment may only be enforced, and

(ii) a seizure or eviction may only be carried out,

in accordance with this Act;

[32] Therefore, the *Civil Enforcement Act* legislates the procedures to be followed for enforcement of money judgments by writs, and does not pertain to the Partition and Sale Order which was issued pursuant to the provisions of *The Matrimonial Property Act* and *The Law of Property Act*, enforcing a right *in rem*.

[33] If further steps are taken to effect the provisions of the Partition and Sale Order, then either party may bring application to determine the division of matrimonial property, including the matrimonial home. The Applicant deposes that since the date of separation, he has purchased further property adjoining the original property and has made improvements to the property. He may specify this acquisition and these improvements in any subsequent proceedings for the division of matrimonial property, including any claims for exemption.

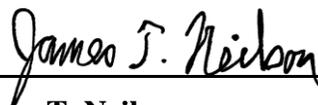
Spousal Support

[34] The issue of spousal support is not before me in this application, but either party may make application, should they so choose, to vary the existing spousal support order set out in the original Divorce Judgment, as varied by the Order of Justice Graesser, following financial disclosure.

[35] In conclusion, I dismiss the application to set aside the four Orders of the Court in question. Although the Orders of Justice Neilson and Justice Ouellette are now moot, the costs which were awarded in each Order, \$300 and \$500 respectively, remain due and payable by the Applicant to the Respondent. The Respondent will also have her costs of this special chambers application under Column 1 of Schedule C for a contested application requiring a brief.

Heard on the 19th day of April, 2021.

Dated at the City of Edmonton, Alberta this 28th day of April, 2021.



James T. Neilson
J.C.Q.B.A.

Appearances:

Megan Tupper
Long Family Group LLP
for the Applicant

Mark Demas
TC Family Law Group
for the RespondentFor