

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-12-291076-077

DATE: September 28, 2007

IN THE PRESENCE OF: THE HONOURABLE ROBERT MONGEON, J.S.C.

I. B.
Plaintiff
v.
D. BR.
Defendant

JUDGMENT

[1] The Court is seized of a Motion for Interim Measures and for Provision for costs on behalf of Plaintiff.

[2] Usually, these issues are dealt with "Séance Tenante". However, because of the particular circumstances of this case, the Court feels that a written judgment is required.

[3] The parties have been dating since December 2005 while the Plaintiff resided in Town A and the Defendant resided in Town B.

[4] In December 2006, Defendant proposed marriage to Plaintiff and gave her an engagement ring of substantial value. An expert gemmologist has evaluated the ring at CAN \$24,000.00.

[5] Defendant moved to Town A on March 9, 2007. The parties rented an apartment at [...], for \$700.00 per month plus \$75.00 for parking.

[6] The parties were married on March 17, 2007.

[7] The marriage was a failure. The parties separated on May 27, 2007, seventy one days after celebrating their union.

[8] Divorce proceeding were instituted by the Plaintiff on September 11, 2007.

[9] According to Plaintiff's present Motion, there is no family patrimony to speak of, except for household furniture wedding gifts consisting mainly of kitchen and cooking utensils¹. The total value of these items is less than \$5,000.00, the value of the vehicles of the parties and, of course, the wedding ring must be added to that amount.

[10] After the separation, the Plaintiff removed certain personal items from the common domicile, including a toaster, food processor, kettle and casserole set received as gifts from her family.

[11] She looked for and did not find her diamond ring, as well as her Tiffany earrings and necklace worth approximately \$450.00.

[12] In her Motion, the Plaintiff states that in order to bring this whole matter to an end, she was, on a "without prejudice" basis, willing to settle the accessory measures to

¹ Details of the family patrimony are given in paragraphs 17, 18, 19 of her Motion, which read as follow:

17) Prior to the marriage of the parties, Plaintiff purchased the following items:

- a) Mattress (value approximately 712\$)
- b) Kitchen table and chairs (value approximately 488\$)

and received, as gifts, the following items:

- c) Kettle, casserole dishes, food processor

18) Prior to the marriage, as engagement gifts from family members and friends, Plaintiff and Defendant received the following items:

- a) Toaster oven
- b) A dish set
- c) Kitchen utensils
- d) A cheque for 1,000\$ from Defendant's brother

19) During the course of their marriage, the parties acquired the following movable property:

- a) Television (value approximately 2,500\$)
- b) Pier 1 tabletes (value approximately 120\$)
- c) Air conditioning unit (value approximately 100\$)
- d) Lamp (value approximately 43\$)
- e) Kitchen utensils and place mats (value approximately 90\$)
- f) Bed-cover (value approximately 100\$)
- g) Small ottoman "pouffe" (value approximately 50\$)
- h) Tools (value approximately 100\$)

the divorce by leaving to the Defendant all property listed at paragraphs 17, 18 and 19 (except for the toaster oven, kettle, casserole set and food processor) as well as the \$24,000.00 ring. In return, she asked to recuperate:

- a) her Tiffany earrings and necklace;
- b) approximately fifty photographs of herself, family and friends taken by the Defendant during a trip to [Country A];
- c) the wire attachment for a car battery charger borrowed from her father.

[13] The Defendant would, in turn, assume the payments for the balance of the lease of the common domicile.

[14] The Defendant has refused this proposal. As the record now stands a trial of the issues will have to take place.

[15] Plaintiff alleges that the attitude of Defendant is "nothing short of abusive", and is only directed towards maliciously aggravating her and causing her to spend time and money in a trial which could have been avoided.

[16] Plaintiff therefore claims a provision for costs in the amount of \$11,831.43 (plus taxes) to cover fees incurred and to be incurred as a result of Defendant's abusive conduct and irrational position, imposing a trial of issues which could easily have been settled, and unnecessary delays resulting from his behaviour.

[17] Plaintiff does not seriously dispute the fact that the traditional criteria applicable to a provision for costs are not applicable here: there is no factual situation which suggests that she would be incapable of exercising her rights, but for said provision for costs.

[18] See: A.B. et al c. A.B. et Y.Z. mise en cause; 2007 QCCA 1012 for a very recent analysis of the principles which must be taken into account in granting or refusing such a provision.

[19] Plaintiff relies on an unreported judgment of Mr. Justice Jean Guibault dated April 3, 2003 in file 500-12-171643-889 which stated that a Motion for provision for costs may nevertheless be granted "*considérant l'historique et la nature tout à fait exceptionnelle du dossier*". In other words, Plaintiff claims that the Defendant's attitude is such that he is literally forcing a trial which could have been avoided in its entirety. Consequently, Defendant should bear the entire cost of same and the proper way to do this is to force him to provide Plaintiff with a provision for costs.

[20] Although the proposition is interesting. I must respectfully disagree.

[21] Defendant's attitude appears to be, in fact, unreasonable. Why would he want to proceed to trial where he stands to lose one half of the family patrimony as well as having to possibly reimburse Plaintiff for the value of the engagement ring? Why would he refuse the proposal of Plaintiff, essentially forgiving in his favour nearly the entire value of the family patrimony as well as the ring?

[22] It is quite possible indeed that Defendant's position will turn out to be frivolous and vexatious. But this is a decision for the trial judge on the merits. It is not for the undersigned to presume the conclusions of the final judgment.

[23] If Defendant's attitude is in violation of the principles set forth in Viel c. Entreprises Immobilières du Terroir Ltée, (2002) R.J.Q. 1262 (C.A.) then the trial judge will be in a position to adjudicate accordingly on the issue of costs and, if necessary or advisable, condemn Defendant to costs on a solicitor-client basis.

[24] For these reasons, the Court is not inclined to grant a provision for costs, although it would appear that Plaintiff's position is logical, and could have brought about a quick and efficient disposition of this matter, whilst Defendant position appears to be the opposite and may cause a debate which, at the end, may be seriously detrimental to his own personal interests.

[25] Consequently, Plaintiff's Motion for provision for costs will be dismissed without costs.

[26] Plaintiff's Motion also seeks certain interim measures.

[27] She asks the Court for an order for the immediate return of her Tiffany earrings and necklace.

[28] Defendant admits that he has no right to claim, proprietary or otherwise, with respect to the said earrings and necklace. He only reason he invokes to withhold these items from Plaintiff is a strategic one.

[29] An interim order should therefore issue for the immediate return of the Tiffany earrings and necklace.

[30] Plaintiff also asks for the return of her diamond engagement ring which she was ready to abandon to Defendant as part of her proposed settlement. Now that there is no settlement, she wishes to have her ring back, which she considers to be her property.

[31] However, Defendant claims ownership of the ring. Furthermore, the ring itself cannot be returned because Defendant has sold it.

[32] The Court cannot adjudicate at this stage upon the issue of the ring without a full trial on the merits. In addition, there is no urgency or special circumstances justifying an interim order with respect to this issue.

[33] Defendant has agreed to print duplicates of the fifty photos representing the Plaintiff as well as her friends and family taken during the couple's trip to [Country A].

[34] Defendant has indicated to the Court that he could print these photos within 30 days (he is a photographer by profession). However, it would appear that a printed set of these photos already exists. Therefore, there is no reason for the 30 day delay. Defendant can easily remit the existing prints to the Plaintiff and take the time he wishes to re-print new photos, since he has the negatives. Consequently, the Court will order Defendant to return the said photos within seven days.

[35] The wire attachment for the car charges is not a contested issue. It should also be returned forthwith.

[36] As for the balance of the lease for the common domicile, the Defendant continues to occupy the premises and he is currently paying the rent. No interim order is necessary.

[37] The Court has had ample time to exchange with the parties' counsel with a view to trying to settle and close the file. This could not be achieved, most probably because the separation and the breakdown of the marriage are still too recent and those fresh wounds are still open. Hopefully, time will heal those wounds.

[38] Although the Court has noted a certain lack of flexibility on the part of Defendant, there was no bad faith on his part. There is however a certain degree of insecurity and fear of not making the "right decision", whilst Plaintiff seems to be more prepared to come to an agreement.

[39] This matter will now proceed to trial on the accessory measures to the divorce proceedings. Hopefully, the parties and their respective attorneys should be able to reach a suitable settlement on such measures and proceed to judgment on the divorce on a consent basis after the required one-year separation will have been completed. It would be unfortunate and totally counter-productive to proceed otherwise.

[40] **FOR THESE REASONS**, the Court:

[41] **DISMISSES** Plaintiff's Motion for Provision for Costs.

[42] **GRANTS** Plaintiffs Motion for Interim Measures as follows:

ORDERS Defendant to remit to Plaintiff the following items within seven days of the present judgment:

- a) Plaintiff's Tiffany earrings and necklace.
- b) Approximately 50 photographs from the recent trip to [Country A] representing the Plaintiff, her family and friends.
- c) Wire attachment for car charger.

[43] **THE WHOLE WITHOUT COSTS.**

ROBERT MONGEON, J.S.C.

Me Doree Levine
ROBINSON SHEPPARD SHAPIRO
800, Place Victoria
Bureau 4600
Montréal (Québec)
H4Z 1H6
(514)878-2631
(514)878-1865 FAX
dlevine@rsslex.com dlevine@rsslex.com

Me Sébastien St-Clair
ST-CLAIR ET ASSOCIÉS
5266, boul. Saint-Laurent
Montréal (Québec)
H2T 1S1
(514)234-3333
(514)227-5451 FAX
Info@saint-clairavocats.org Info@saint-clairavocats.org

Date of hearing: September 27, 2007