



SUPERIOR COURT OF JUSTICE

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FAX COVER SHEET

Date: December 2, 2010

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FROM: Eva Stocks / A/Asst. to Madam Justice Greer

TOTAL PAGES (INCLUDING COVER PAGE): 9

MESSAGE:

RE: Court File No. FS-10-16919
Klapman v. Abitbol

Attached please find Madam Justice Greer's Reasons for Judgment dated December 2, 2010 with respect to the above-noted matter.

A hard copy to follow in the mail.

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CITATION: Klapman v. Abitbol, 2010 ONSC 6651

COURT FILE NO.: FS-10-16919

DATE: 2010/12/02

ONTARIO

SUPERIOR COURT OF JUSTICE

FAMILY LAW

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BETWEEN:

ARLA LEE KLAPMAN

Applicant

- and -

JOSEPH ABITBOL

Respondent

) Jaret Neil Moldaver, for the Applicant

) Gary S. Joseph, for the Respondent

☐

) **HEARD:** November 18, 2010

GREER J.:

[1] The Respondent, Joseph Abitbol, (“the Father”) brings this Motion to set aside the final Order of Mr. Justice Czutrin dated October 20, 2010. If the Order is not set aside, the Father asks for an Order granting him Leave to serve and file an Answer in this matter within twenty (20) days of this Order. Although the Father’s Notice of Motion asks for both heads of relief, as opposed to in the alternative, I am satisfied that this is what the Father intended and the error is one of grammar and not substance.

[2] The Applicant, Arla Lee Klapman (“the Mother”) opposes the relief being requested to have the said Order set aside or, in the alternative, to have the default judgment set aside and to allow the Father to provide an Answer.

[3] The parties were married on February 23, 2002 and separated on April 13, 2006. There are two (2) children of the marriage, namely Charli who is now seven (7) years of age and Mylcs who will be six (6) years of age in December. Under the provisions of the parties’ Separation Agreement dated May 16, 2007, the parties agreed to have joint custody of the two (2) children. The children were to have their primary residence with their Mother and the Father was to have “reasonable and generous access” pursuant to the provision of paragraph 4.2 of the Agreement.

[4] Paragraphs 4.3 and 4.4 say that the parties will co-operate to ensure that if either of them cannot care for the children on an occasion, each will inform the other so that the other parent may take care of the children. In addition, they agree to be flexible about residency arrangements and to always consider the best interests of the children. Further details set out how these aims are to be accomplished.

The Final Order of Mr. Justice Czutrin dated October 20, 2010

[5] A final Order of this Court was made by Mr. Justice Czutrin ("the Judge") on October 20, 2010, in which he granted the Mother sole custody and residential custody of the children. In addition, he set out a child access schedule based on the Father having only alternate weekend access and one dinner visit with the children during the week of his access weekend. On the week the Wife has her weekends with the children, the Father was to have two dinner visits. Costs of \$5,500 were awarded against the Father.

[6] The problem with the Order is that not only was the Father not in attendance when the Motion was heard, he had no input into such an access schedule. He now asks that the Order be set aside.

[7] The parties are in this Court only because the Mother on July 30, 2010 had an Application issued. In that Application, the Mother asked for the relief she achieved on the appearance before the Judge. The major complaint of the Mother is she felt that certain changes made to the access terms of their Agreement by her and the Father, were simply leading to the Father trying to achieve equal time with the children.

[8] In this way, says the Mother, the Father as "...part of an agenda to terminate his child support obligations", would reach the position where he could terminate child support obligations to her. In paragraph 7 of the "Important Facts Supporting my other Claim(s)", she says this is what he did.

[9] In paragraphs 11-18, the Mother sets out the issues of "Decision Making", and in paragraphs 19- 21, the "Residency Schedule" she now wants. That Schedule made sure that the Father would not have equal time with the children and would thus be subject to the child support provisions of the parties' Agreement.

[10] The Mother arranged personal service on the Father of the Application, the Respondent's Notice and the Affidavit of Custody & Access on August 3, 2010.

[11] The Father acknowledges that he received the Application. He says, however, in paragraph 7 of his Factum that he had "direct discussions with the Applicant wherein a number of the matters raised in the pleadings were addressed." He says he was assured by the Mother, that it was unnecessary for him to retain counsel or file any responding documents to the Court proceedings.

[12] Since the Father did not respond to the Application, the Mother was able to proceed in default of him answering. She then moved on October 20, 2010, before the Judge for the Final Order. The Wife says that the Judge heard *viva voce* evidence at a full hearing before him. There

is no transcript of the hearing and no reference in the Judge's Endorsement about this. I, therefore, base my reasons on what was before me on the Motion.

[13] The Father was served with a copy of the Order on November 3, 2010, at approximately 8:15 p.m. He retained counsel two (2) days later to try to get the Order set aside.

Mediation under the Agreement

[14] The parties entered into their Agreement dated May 16, 2007, with the assistance of counsel. They did not use the Court system to reach its terms. Each party was represented by counsel. There are Certificates of Independent Legal Advice attached to the Agreement. With respect to parenting issues that may arise between the parties, paragraph 4.23 reads:

If Arla and Joseph are unable to resolve a parenting issue other than relocation, they will mediate/arbitrate the issue with a mutually agreeable candidate. The parties will share equally the cost of the mediation. If the parties cannot resolve the issue through mediation, the mediator will arbitrate the issue. If there is an arbitration, the arbitrator will have the right to reapportion costs. The parties waive Section 35 of the *Arbitration Act* and appreciate that the recent amendments to the *Arbitration Act* may require that they enter into a Mediation Arbitration Agreement which conforms to the amendments and regulations. It is the parties' intention to do so should this paragraph become operative.

[15] It is clear from the materials before me that the Judge knew of the Agreement made by the parties, as he refers to it in his Endorsement of October 20, 2010. He says in that Endorsement that the Respondent did not appear and filed no Answer. He then says that the Mother told him that upon receiving the Application, she "was told by the Respondent that he would "...tie her up in court for years."

[16] Since there has been no questioning on these matters, it is impossible to say who said what to the other party. I accept, however, that the parties spoke to one another after the Application was served on the Father.

[17] The Judge does not say that he read the paragraph respecting mediation. He says that he is "at a loss" as to why the Father did not file an Answer or appear on the Motion. The Judge, therefore, may not have had the provisions of paragraph 4.23 brought to his attention.

The parties' positions

[18] It is clear from the affidavits filed by the parties that there has been a breakdown in communication between them respecting parenting issues. The Father says that he did consult counsel and it was his intention to defend the proceedings, but after speaking to the Mother, whom he says, assured him that it was unnecessary for him to retain counsel or file anything, he did not do so.

[19] The Father's counsel quickly moved by e-mail to ask the Mother's counsel to agree to set aside the Order, "...so that the substantive issues raised by your client in her Application can be dealt with on the merits." The Mother did not agree to set the Order aside.

[20] The Father goes on to set out in some detail how parenting has taken place since the separation and how the parties worked it out so that he and the Mother shared equal time with the children.

[21] One of the difficulties between the parties appears to be that the Mother's income greatly exceeds that of the Father. The Father says she purchased a home at a cost of about \$4,500,000, while he was only able, after two years to purchase a modest three-bedroom semi-detached home. He says his income is modest compared to that of the Mother.

[22] The Mother's new fiancé is said to have referred to the Father as a "deadbeat Dad". This confrontational attitude, if true, does not help the situation. It is certainly not in the children's best interests. Both parties acknowledge that each has a new person in his or her life.

[23] The Mother twice called the Jewish Family and Child Services in May and August of 2010 about issues between the parties. Nothing came of the visits from the JFCS. The Father says, however, that the JFCS visits upset the children.

[24] The Mother denies that she talked the Father out of providing an Answer to her Application. She says in her affidavit that she has not been able to have "...any form of productive dialogue with Joseph for some time now due to his continued belligerence, aggression and abuse." It is her position that there has been a material change in circumstances, which are sufficient to cause the entire Agreement to be varied by the Court, including the dispute resolution clause.

[25] The Mother, in my view, sees the Father's failure to continue to pay child support as showing that he is not child-focused. She sees it as part of his agenda to terminate child support. She thinks her version of custodial arrangements for the children is what is best for them. In my view, the issuing of the Application and the steps the Mother has taken are really all about child support and the Father's deliberate failure to continue to pay it.

Analysis

[26] The Agreement provides in paragraph 4.23 for mediation to take place when the parties are unable to resolve a parenting issue other than relocation. The Agreement does provide, however, in paragraph 5.9, that in addition to a yearly review, either party may seek a change in child support, "...if there is a material change in the condition, means, needs or other circumstances" of the parties or the children that would affect child support.

[27] Paragraph 5.10 sets out a description of what a material change may include in subparagraphs (a) to (g). In this regard, paragraph 5.11 states:

Whoever seeks a change will give the other, in writing:

- (a) notice of the proposed change,
- (b) evidence supporting the proposed change, and
- (c) any request for information necessary to determine the issue.

[28] I cannot find, in the materials before me, any evidence that the Mother gave the Father any notice in writing under this paragraph or in any respect complied with the provisions of this paragraph. She simply had an Application issued.

[29] In my view, the tenor of the Agreement is one whereby the parties are to seek the co-operation of the other party through mediation. If one party thinks there has been a material change in circumstances, that person puts the other party on notice in writing, provide an outline setting out what the proposed change docs, and gives a request for information necessary to determine the issue.

[30] Simply because the Mother feels that the Father is not answering her questions about changes with respect to his employment and living arrangements is not enough to create a material change in circumstances. Nor is it sufficient to say that the Father has become "hostile" as a result of that questioning. In my view, these complaints as set out do not fit within the wording as set out in paragraph 5.9.

[31] Under the Agreement, the parties agreed to mediate/arbitrate, rather than go to Court. Section 6 of the *Arbitration Act*, says that no Court shall intervene in matters governed by this *Act*, except for certain purposes, none of which apply in these circumstances. Under section 7, if a person subject to an arbitration agreement starts a Court proceeding, the Court where the proceeding is started, may stay the proceeding. See also: Rule 21 of the *Rules of Civil Procedure*.

[32] These principles are enunciated in *Haratsis v. Haratsis* 2007 CarswellOnt 625 (S.C.J.), a family law decision of Madam Justice Thorburn. She, in turn, considers the reasoning of Mr. Justice Blair, as he then was, in *Ontario Hydro v. Denison Mines Ltd.* (1992), 1992 CarswellOnt 3497 (O.C.J. (Ont. Gen. Div.)), where he noted on p.3 that the *Act*, "...entrenches the primacy of arbitration proceedings over judicial proceeding once the parties have entered into an arbitration agreement...".

[33] In *MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 CarswellOnt 5752 (Ont. C.A.), the Court considered its decision in *Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 505 (Ont. C.A.). It examined what a Court is to consider when deciding whether to stay a claim and give effect to an arbitration clause. The Court must first interpret the arbitration provision, which I have already done. Then it must analyze the claims to determine if they must be decided by an arbitrator under the terms of the agreement. I have done that in my analysis. I have found that in these circumstances, the parties must first proceed by way of mediation/arbitration under their Agreement. One party cannot summarily decide on his or her own that there has been a material change in circumstances, without following the appropriate steps set out in the Agreement.

[34] Having done the appropriate steps, I conclude that under S.7 the action must be stayed and the parties' differences referred to mediation/arbitration. See also: *Stone v. Polon* 2006 CarswellOnt 4494, 36 C.P.C. (6th) 64 (Ont. C.A.).

[35] Recently, the Court of Appeal applied these principles in a family law case, *Owers v. Owers*, 2009 CarswellOnt 1847 (Ont. C.A.). There the parties' agreement had a mediation-arbitration clause in it. While the facts, in that case, are somewhat different than in the case before me, the Court ordered the matter to proceed to mediation-arbitration. In paragraph 13 of *Owers, supra*, the Court said that, "No purpose would be served by interpreting the legislation in a way that would permit parties to withdraw at will from agreements properly entered into by their legal representatives in the course of litigation."

[36] Based on these principles, as set out above, I order that the final Order of Mr. Justice Czutrin dated October 20, 2010, in this proceeding, be set aside. The parties must then proceed to mediate/arbitrate their issues, which relate to child support and a changed access schedule. See also: *Marchese v. Marchese*, 2007 CarswellOnt 248 (C.A.) at paragraphs 1-3.

[37] If I am wrong in this regard, pursuant to Rule 19.08 of the *Rules of Civil Procedure*, I would set aside the final Order of the Judge on the uncontested proceeding. This Rule applies by analogy to family law proceedings under Rule 1(7) of the *Family Law Rules*. Similarly, under subrule 19.08(3) once the Judgment is set aside, I may set aside the noting of default when the default judgment was granted.

[38] The test with respect as to whether a default judgment should be set aside is set out in paragraph 28 of *Page-Cole v. Cole*, 2009 CarswellOnt 6373 (S.C.J.). There the Court said that the moving party on such a Motion must meet three (3) criteria, namely:

1. The motion to set aside a default judgment should be made as soon as possible after the applicant becomes aware of the judgment;
2. The moving party's affidavit must set out the circumstances under which the default arose that gives a plausible explanation for the default;
3. The moving party must set out the facts to support the conclusion that there is at least an arguable case present on the merits.

[39] In my view, the Father has met the criteria necessary to have the default judgment set aside. He was at his counsel's office within two (2) days of being served with the Order. He set out in some detail why he thought that he did not have to respond. He had already seen a lawyer before the final Order was granted and had an honest belief that he and the Mother had an agreement that he would not need to respond. Since the issues involve child support and access arrangements, the Father has an arguable case. The parties had reached an agreement between them to give him more access, when the child support payments stopped being paid by him.

[40] In *Page-Cole, supra*, there was a much greater time delay about filing an Answer and a Financial Statement. An extension was finally granted and the husband's Answer and Financial Statement were not filed within the time granted. Default judgment followed. After several more months, the husband's solicitor got off the record and the husband began acting on his own


behalf. He again failed to file the Answer and the Statement. On the Motion to set aside the default judgment, the Judge was satisfied that the husband has given a plausible explanation, and it was set aside and he was given time to serve and file his Answer and Statement.

[41] The situation in the case at bar is similar to that of *Page-Cole, supra*, I adopt reasoning in that case and apply it to the one before me. The Father shall therefore be given twenty (20) days to file his Answer and up-to-date Financial Statement.

[42] Since I have set aside the final Order and the default judgment, the parties shall revert to the provisions of their Agreement regarding child support and access during the period of the mediation/arbitration until all issues have been resolved between them. The on-going child support and S.7 expense payments shall commence immediately based on the Father's income as shown in his 2009 Income Tax Return. The mediator/arbitrator shall deal with any arrears of child support and S.7 expenses, all access issues and any other issues between the parties, which may have arisen since the Agreement was signed.

Conclusion

1. The Judgment/Final Order of October 20, 2010 of Mr. Justice Czutrin is hereby set aside, including his Order as to Costs. The parties shall proceed to choose a mediator/arbitrator within the terms of their Agreement to assist them in resolving their issues.
2. In the alternative, if I am wrong in regard to my interpretation of the parties' Agreement, the Father shall have twenty (20) days to serve and file his Answer and up-to-date Financial Statement.
3. If the parties cannot agree on Costs, and if Offers to Settle were exchanged, I will receive brief written submissions from them within thirty (30) days of the date of this Order, not longer than three (3) pages in length, with time docketts and case law, if any. If no Offers of Settlement were exchanged between the parties, since the Father was successful on his Motion, he shall submit his submissions first and the Mother shall have seven (7) days thereafter to send her submissions in, with a Reply by the Father, if necessary, seven (7) days thereafter.


Greer J.

Released: December 2, 2010

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COURT FILE NO.: FS-10-16919

DATE: 2010/12/02

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ARLA LEE KLAPMAN

Applicant

- and -

JOSEPH ABITBOL

Respondent

REASONS FOR JUDGMENT

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Released: December 2, 2010