

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Alami Hassani Mounia)	
)	Paul C. Buttigieg, for the Applicant
Applicant)	
)	
- and -)	
)	
Fadi Jami Haddad)	
)	
Respondent)	Charles Baker, for the Respondent
)	
)	
)	
)	
)	HEARD: April 24, 2019

DECISION ON MOTION - PRESERVATION ORDER

SUTHERLAND J.:

OVERVIEW

- [1] On May 31, 2018, McDermot J. granted a preservation order in favour of the respondent that the applicant be restrained from disposing of, alienating or encumbering her interest in the matrimonial home located at 77 Red Cardinal Trail, Richmond Hill, Ontario, including any monies remaining in the applicant's hands as advanced under the mortgage in the sum of \$203,000.

- [2] The respondent brought an *ex parte* motion in front of McDermot J. due to the applicant registering the mortgage on the matrimonial home after receiving a divorce order on March 14, 2018. On April 17, 2018, the applicant had the matrimonial home designation registered against the title of the matrimonial home removed to facilitate the registering of the mortgage.

- [3] The applicant registered the mortgage and removed the matrimonial home designation knowing that the respondent sought an equalization payment in this proceeding,

Order of Dermott J. dated May 31, 2018

- [4] McDermot J. in granting the relief outlined in paragraph 1 of the respondent's *ex parte* motion made the following comments:

...

Although the Respondent claims the divorce was without notice, it was not, as he was present when Kaufman J. ordered it. However, there are property claims, and the mortgage is extremely concerning considering how both Kaufman J. and Di Luca J. mentioned those property claims in prior endorsements. This is concerning to the court.

...

The Respondent has provided me no authorities permitting me to order registration of a preservation order as against the property notwithstanding the fact that he filed a factum. That issue, along with other issues, is adjourned to June 14, 2018 at 9:30 am to be spoken to.

The Applicant to be forthwith served with motion and affidavit. If the Respondent wishes to set aside the mortgage (see paragraph 5 of the notice of motion), he shall also serve the mortgagee personally with Notice of this motion, affidavit along with this endorsement and order.

- [5] It appears to this court that McDermot J. granted the respondent the preservation order as requested in the notice of motion. The issues of setting aside the mortgage and registering the court order on title was not determined and was left to be adjudicated later.

Positions of the Parties

- [6] The applicant submits that the order of McDermot J. should be set aside. The applicant argues that the respondent failed to provide full and frank disclosure to the court. The affidavit filed in support of the motion, the applicant contends, did not advise the court that that on September 11, 2004, the respondent agreed, in writing, that his equity in the matrimonial home be given to his children Miriam and Sabrina after the divorce. The applicant argues that given the relinquishing of his share in the equity in the matrimonial home, the respondent had no interest in the matrimonial home and thus, a preservation order should not continue. In addition, the applicant argues that the respondent failed to bring to the *ex parte* motion judge the issues on the date of separation.

- [7] The respondent disagrees and contends that he provided McDermot J. with full and frank disclosure. He submits that the agreement dated September 11, 2004 is not a domestic contract pursuant to the *Family Law Act*¹ (the Act) and is not legally binding or enforceable. He further contends that on the basis of the facts, a preservation order is justified and McDermot J. was correct in granting the preservation order.

Analysis and Law

- [8] In seeking an order from an *ex parte* motion, the law obligates the moving party to provide the court with full and frank disclosure.² The obligation to provide full and frank disclosure is strict given that the court does not have the benefit of the submission of the opposing party. This obligation is described in the much utilized statement of Justice Sharpe in *United States of America v. Friedland*:³

For that reason, the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts and laws. The moving party must state its own fairly and must inform the Court of any points of fact or law known to it which favours the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of inherent in any situation where a Judge is asked to grant without hearing from the other side.

- [9] In determining if the obligation imposed by law has been breached should the granted order be set aside, the court examines if the granting of the order may have been affected by the non-disclosure.
- [10] It is not disputed that the document signed by the parties dated September 11, 2009 (the document) was not disclosed to McDermot J. The document purports to deal with the respondent's interest in the equity of the matrimonial home. Further, it is not disputed that there is an issue of the date of separation which may prevent the respondent from commencing a claim for equalization due to limitation date pursuant to the Act.
- [11] I am not persuaded that the failures to produce the document or the date of separation falls within the realm of the strict obligation of frank and full disclosure. The document has not been validated by a court as a legally enforceable domestic contract. The legality of the document is still in question. Moreover, the date of separation has not been adjudicated by the court.
- [12] It appears to me that the existence of the document and the issue of a limitation date lends to the granting of the preservation order. The document brings into question and into focus

¹ R.S.O. 1990, c F.3

² *Milosevski v. Milosevski*, FC-17-053090-00, Newmarket, March 18, 2019.

³ [1996] O.J. 4299 (GD), at para. 27.

equalization of net family property including the extent of the respondent's interest in the equity of the matrimonial home. The removal of the matrimonial home designation by the applicant would seem to negatively affect the respondent's security of his equalization of net family property claim, including his equity in the matrimonial home until the issues have been adjudicated. As McDermot J. stated, this gives the court "concern."

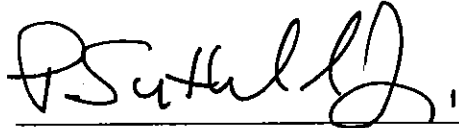
- [13] Consequently, I am not persuaded that the failure of the respondent to disclose the document or highlight the issue of date of separation may have affected the granting of the preservation order by McDermot J. The disclosure of the document may have actually supported the decision on the *ex parte* motion judge in granting the preservation order.
- [14] Thus, I do not accept the submission of the applicant that the preservation order granted by McDermot J. must be set aside.

Disposition

[15] I make the following order:

- (a) The preservation order of McDermot J. dated May 31, 2019 against the matrimonial assets of the applicant, including the matrimonial home municipally known as 77 Cardinal Trail, Richmond Hill, Ontario, L4E 4B8, more particularly described as PIN 03206-2472 (LT), Lot 4 Plan 65M3664, Richmond Hill. S/T RT for a period of 2 years from 2004/03/15 or until the expiration of the guarantee period for the service, whichever date is later, in YR440799, which includes any monies remaining in the possession of the applicant as advanced under the mortgage to the applicant on May 26, 2018 shall continue until further order of this court.
- (b) If the respondent requires any further order to register this order and/or the order of McDermot J. dated May 31, 2019 on title, I may be spoken to.
- (c) Either party may schedule a settlement conference with the trial co-ordinator.

[16] If the parties cannot resolve the issue of costs, the respondent to serve and file his written submissions within 21 days of this decision and the applicant shall have a further 21 days to serve and file her response. There is no right for any reply submissions. The written submissions to be no more than three pages, double spaced, exclave of any bill of costs, case law and offers to settle. If no submissions are received within the time line set out above, there will be an order of no costs.


Justice P.W. Sutherland