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Docket: CI 15-01-94070
(Winnipeg Centre)
Indexed as: The Estate of Denise Joanne Pynenburg et al. v. Donald Rocan Salkeld
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

	)	Counsel:
	)	
THE ESTATE OF DENISE JOANNE PYNENBURG	)	
by her ADMINISTRATOR KELLY JOYCE PYNENBURG	)	
and the said KELLY JOYCE PYNENBURG in her	)	Michael J. Weinstein
personal capacity,	)	and Victoria L. Weir
	)	for the plaintiffs
plaintiffs,	)	
	)	
-and-	)	Jon W. Van Der Krabben
	)	for the defendant
DONALD ROCAN SALKELD,	)	
	)	
defendant.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	October 26, 2020

REMPEL, J.

Background

[1] Denise Pynenburg ("Denise") and Donald Salkeld ("Don") were in a common-law relationship for 21 years. The relationship ended in August of 2003. Denise and Don entered into a written agreement resolving the legal issues in dispute between them,

by way of direct negotiations between themselves and also through their respective lawyers. A comprehensive "Settlement Agreement" was reached through this negotiation process and signed by Denise and Don in the presence of their respective lawyers on September 7, 2007 (the "Agreement").

[2] Denise died slightly more than three years after the Agreement was signed and her estate sues to enforce Don's obligations under the Agreement. Don has defended the action by saying he does not have ongoing obligations to the estate because the Agreement provided for the payment of ongoing spousal support, which ceased at the time of Denise's death.

Issues

[3] This is the estate's motion for summary judgment. The only evidence before me is affidavit evidence and the cross-examination on the affidavits filed by the parties and the cross-examinations of Don and Kelly Joyce Pynenburg ("Kelly"), Denise's daughter, who filed the claim in her capacity as executor of her mother Denise's estate and in her own right.

[4] Don disputes that this is a case that can be fairly resolved on affidavit evidence alone and he insists a traditional trial, where his credibility can be fairly assessed, is crucial to a fair process. In the main, Don argues that the Agreement can only be properly understood if he testifies about the nature of his discussions and email exchanges with Denise prior to and after the signing of the Agreement. Without a traditional trial, Don insists that the full extent and content of the Agreement cannot be properly understood.

Decision

[5] I am satisfied that the plaintiffs have met their burden to prove that this is an appropriate case for summary judgment. I will grant summary judgment in favour of the estate and Kelly in the amounts set out in these reasons.

Key Features of the Agreement

[6] The key features of the Agreement that are the focal point of this litigation call for Don to pay Denise a non-taxable lump sum of $204,000 in monthly installments of $1,500 until paid in full and for Don to maintain a $200,000 life insurance policy, which irrevocably names Denise and Kelly as beneficiaries for the rest of his life.

[7] The following facts are not in dispute.

(a) Don made all of the monthly payments called for in the Agreement ($59,560 in total), but stopped making these payments after Denise died in 2010;

(b) when Denise died the amount owing on the $204,000 lump sum had been reduced to $130,850;

(c) prior to her death Don made a $20,000 payment to Denise to assist her in making a down payment on a condominium, but the parties differ on whether this payment can be categorized as a gift to Denise or a payment to be credited against the $204,000 lump sum; and

(d) Don failed to maintain the required life insurance policy. Denise was removed as a beneficiary under the policy in August of 2006 and Kelly was never named as a beneficiary under that policy.

Text of the Agreement

[8] In paragraphs 6 through 9 of the Agreement, which are included under the heading "*Spousal Support*," the Agreement provides that:

i) the $204,000 payment from Don to Denise is to be described as a "lump sum support payment to achieve a resolution of claims and division of assets as between the parties" payable in installments of $1,500 per month (3 x $500 in each month) "until the $204,000.00 is paid in full to Denise";

ii) unlike typical spousal support payments, the monthly payments of $1,5000 are intended by the parties to be tax neutral, meaning Denise would not claim the payments as part of her annual income and Don could not claim them as a deduction against his income;

iii) either party had the option to file the Agreement with the Designated Officer of the Maintenance Enforcement Program ("MEP") so that the monthly payment obligation would be payable through MEP;

iv) the "installment payments" could be accelerated or increased, or Don could "…pay the entire amount owing at any time in a lump sum payment. Alternatively, there may be a partial lump sum payment made to Denise at any time by Don, which will not affect or vary the subsequent tri-monthly installment amounts" set out in the Agreement; and

v) on payment of the "total amount of $204,000.00" to Denise, Don's obligations to Denise would terminate "save and except" for the maintenance of the

$200,000 life insurance policy irrevocably naming Denise and Kelly as beneficiaries.

[9] The Agreement also provides for a waiver of spousal support at paragraph 16, which states:

> 16. The parties acknowledge and agree that they have reached this Agreement and fully expect and intend that it will be binding upon them. The parties acknowledge that the overriding principal accepted by them is the sanctity of their right to contract freely with one another. The parties acknowledge that they have specifically considered future contingencies including but not limited to the fact that either party may or may not obtain further education, may or may not alter their employment, may or may not have physical or emotional problems or disabilities in the future, and that the parties may have disparate lifestyles. The parties acknowledge their clear and unequivocal intention to insulate their Agreement from review or variation as to their waiver of spousal support and acknowledge and agree that their Agreement is fair and equitable.
>
> [Emphasis mine]

[10] Paragraph 18 of the Agreement contains Don's obligation to maintain a life insurance policy benefiting Denise and Kelly and provides that:

> 18. Don agrees to maintain a life insurance policy naming Denise and her daughter, Kelly Joyce Pynenburg as irrevocable beneficiaries (or in the event of the death of one of them, the survivor), and such policy shall remain in place for the duration of Don's life. The benefit payable to Denise and her daughter, Kelly Joyce Pynenburg, shall be no less than a total of $200,000.00. Don shall provide yearly confirmation to Denise that the policy remains in good standing.

[11] The finality of the Agreement is set out in paragraph 24 which provides that the parties agree that the $204,000 payment "constitutes a complete and final financial and property settlement as between each of them relating to any and all past, present and future claims against one another" and "that this agreement shall be a full and complete answer to any and all claims whatsoever inconsistent with the terms hereof."

[12] Paragraph 26 of the Agreement under the heading "*No Modification*" provides that:

> 26. No modification or waiver of any of the terms of this Agreement shall be valid unless in writing and executed with the same formality as this Agreement or pursuant to an Order of a Court of competent jurisdiction. No waiver of any breach or default shall be deemed the waiver of any subsequent breach or default of the same or similar nature.
>
> [Emphasis mine]

Don's Position

[13] Don concedes that a plain reading of the text of the Agreement supports the interpretation advanced by the estate that the balance owing under the lump sum constitutes a debt it can enforce after Denise's death, but he insists that reading the words as written does not accurately describe what the parties really agreed to and what their true intentions were at the time the Agreement was signed.

[14] Paragraphs 21-24 of the brief filed by Don's lawyer are telling and provide a neat summary, in my view, as to why Don's position must fail:

> 21. *Don's uncontradicted evidence is clear. The agreement was made to support Denise during her lifetime and in accordance with the mutually supportive relationship Don and Denise had. Don and Denise agreed that he would contribute reasonably to her support and maintenance and the payments were intended to enable to pay for her anticipated monthly living expenses. There was no agreement nor did the parties intend that Don pay support after Denise passed away for the benefit of her estate.*
>
> *22. Obviously there is no explanation as to why this intention was not set out in the parties' Agreement and there is no wording included in the Agreement that would not leave it open to interpretation as to whether Don should pay Denise after her passing. It is unknown as to why this occurred and no evidence appears to be capable of being provided. Nevertheless, this should not change the parties' clear intention, and Don should be allowed to testify in that regard in order to avoid the significant financial consequences that were never contemplated and which would result in a windfall for Kelly while inflicting devastating consequences upon Don for something that he never agreed to and never intended.*

> *23. On the surface, there is no specific term [in the Agreement] that would allow Don to escape his obligations to maintain an insurance policy should Denise pass away before his payment was complete.*
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> *24. It is submitted that although not specifically stated, clearly the insurance policy was meant to act as a safety net for any support owing to Denise up to her 65th birthday in the event Don would predecease her before she reached that age. Once again it is unknown as to why the clause was not worded to reflect a diminishing payout, which, it is submitted, sometimes, but not always, occurs.*
>
> [Emphasis mine]

The Law

Summary Judgment – First Principles

[15] The parties agree on the legal test for summary judgment set out in ***Dakota Ojibway Child and Family Services et al. v. MBH***, 2019 MBCA 91 (CanLII), which provides at paras. 107-111 that the moving party bears the persuasive burden of proof at all times to establish that the process it is proposing allows for a fair and just adjudication on the merits and that there is no genuine issue requiring a trial. In practical terms this means the moving party must be able to persuade a judge that the proposed process will permit the judge to:

1. make the necessary findings of fact, without using any additional fact-finding powers and that the relevant legal principles can be applied to those facts in order to resolve the matter; and
2. fairly resolve the matter by weighing the evidence, evaluating credibility, and drawing inferences, without the need for a traditional trial, under the principles of proportionality, timeliness and cost-effectiveness.

This persuasive burden of proof rests on the party moving for summary judgment at all times and the applicable standard of proof is on the balance of probabilities.

[16] If the moving party meets this burden, the responding party bears an onus to show why the evidentiary record, the facts or the law preclude a fair disposition of the matter in a summary way. In the alternative the responding party can meet its burden by showing it cannot properly raise its defence in a summary process.

Binding Agreements – First Principles

[17] The Manitoba Court of Appeal's decision in ***Matic et al v. Waldner et al***, 2016 MBCA 60 (CanLII), defines the first principles as to when binding agreements are reached, at paras. 55-57:

> The Law
>
> [55] The standard for determining whether an agreement, written or oral, has been reached, is whether an "objective reasonable bystander", looking at all the material facts, would say so. GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) describes the test as follows (at p 15):
>
> Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. As Fraser C.J.A. said in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.* [2003 ABCA 221 at para 9, 330 AR 353]:
>
> > the parties will be found to have reached a meeting of the minds, in other words be *ad idem*, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty.
> >
> > [emphasis added]

> [56] The requirements for the formation of a contract were described in *Bawitko Investments Ltd. v. Kernels Popcorn Ltd. (1991)*, 1991 CanLII 2734 (ON CA), 53 OAC 314, a leading decision on oral contracts. Robins JA wrote (at para 21):
>
> > However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself.
>
> [57] The principle that can be distilled from *Bawitko and Ghitter (Ron) Property Consultants Ltd v. Beaver Lumber Co.*, 2003 ABCA 221, 330 AR 353 (quoted by Fridman), is that there are three requirements for a binding contract—the intention to contract; the essential terms of the contract have been settled; and the terms are sufficiently certain. Whether the three requirements are met in any case is to be determined from the perspective of the objective reasonable bystander.

Analysis

[18] This matter can be resolved fairly by way of a summary judgment as the agreement is complete and comprehensive. There are no gaps or unexpected contingencies in the agreement that need to be filled in. This means that the evidentiary record is complete and there is no need for me to evaluate credibility. All of the evidence necessary to weigh the evidence and to draw the appropriate inferences and apply the facts to the law can be completed in a summary way.

[19] There is no merit to Don's argument that a traditional trial is necessary, because under the principles set out in ***Matic*** his proposed evidence, where he expects to recount

his subjective thoughts as to what terms the Agreement really meant, is irrelevant. The test in establishing what the Agreement provides for is entirely an objective one.

[20] I am not saying that credibility issues can only be resolved in a traditional trial. But in this case I am satisfied that an objective reading of the Agreement unambiguously reflects the three requirements of a binding agreement as set out in ***Matic***, namely the intention to contract, settlement of the essential terms, and terms that are sufficiently certain. The intention of the parties was to settle the terms as to the division of their family property by way of a lump sum payment payable through installments and dress that up in spousal support language, in order to give Denise the option to pursue payment through the MEP if she wanted to. The life insurance was an added component of this division of family property that would only come into effect on Don's death for the benefit of Denise and Kelly or the survivor of them.

[21] The three requirements essential to a binding agreement are manifestly clear on a plain reading of the text of the Agreement and Don's lawyer does not mince words in admitting exactly that in his brief. The text of the Agreement creates more than sufficient certainty as to what the parties agreed to. In my view, the text creates absolute certainty.

A Level Playing Field

[22] There is a good reason why the law does not permit the subjective perspectives of litigants to creep into agreements that objectively contain the three essential terms of a contract. It avoids complex trials from arising in cases where the words of the agreement provide certainty. Don is asking for a chance to repair an agreement that does not contain gaps or uncertainties with his subjective evidence as to what he thinks

the deal the parties arrived at really was. Further, a trial in this case would create a fundamental unfairness in his favour, because Denise can no longer testify as to what she was thinking at the time.

[23] The risk of an unlevel playing field in Don's favour at a traditional trial is set out in a substantially similar fact situation arising in Alberta. In ***Marasse Estate (Re)***, 2017 ABQB 706 (CanLII), the court found that limited-term spousal support constituted an enforceable debt that the estate of the deceased recipient could collect against the payor. The court noted that the agreement was negotiated by counsel and clearly stated the quantum and duration of the payments. Under the agreement in ***Marasse Estate***, the terms were "non-reviewable" even in a case of a material change in circumstances. In commenting on the comprehensive nature of the agreement the court noted at para. 25 that:

> [25] … It is clear the Agreement was negotiated with give and take on both sides, where the sum of its parts can be considered to be a whole. The spousal support was for a finite sum and a limited duration, negotiated in the full context of all financial issues arising from the marriage. To not consider the whole of the Agreement as enforceable would detract from the policy objectives of negotiated settlement and contractual autonomy discussed in ***Miglin*** [***Miglin v. Miglin***, 2003 SCC 24]. It would also tilt the Agreement in Jean's favour subsequent to the whole of the Agreement being negotiated and agreed upon.

Parol Evidence Rule

[24] This is not a case where the parol evidence rule applies. That rule permits the court to consider supplementary or extrinsic evidence when interpreting a written agreement that seems to embody all the terms of an agreement. In ***King v. Operating Engineers Training***, 2011 MBCA 80 (CanLII), the Manitoba Court of Appeal sets out the

first principles of the "… *difficult, and often confusing, issue of the parol evidence rule and contractual interpretation"* (para. 1).

[25] At paragraph 35 of ***King*** , the Court of Appeal defines the parol evidence rule as follows:

> 35 Basically, the rule can be stated as follows: where the whole of a contract has been reduced to writing, extrinsic evidence is not admissible to add to, subtract from, vary or contradict that written contract. Extrinsic statements and promises cannot affect the parties' obligations as stated in the written agreement.

[26] The Court of Appeal goes on to confirm that the parol evidence rule only applies in cases where the written document does not reflect the complete agreement between the parties or where the parties struck a collateral agreement, at para. 38:

> 38 The first task of a judge in contractual interpretation matters is to determine the terms of the contract. If the court finds, as it did in this case, that the contract is partly in writing and partly oral, the problem of the parol evidence rule does not arise because the rule is not applicable. The rule only comes into operation when the court is satisfied that it was the parties' intention that the writing represents the **exclusive** record of the parties' agreement.

[27] I am satisfied that the boiler plate clauses in the Agreement that I have already mentioned speak to the finality and the sanctity of the Agreement. Paragraphs 16, 18, 24, and 26 of the Agreement were cumulatively designed to preclude exactly the kind of argument that Don is now advancing. The actual wording of the document clearly reflects the intention of the parties to have their obligations defined by the deal they made and that was reduced to writing in the Agreement, rather than some other kind of deal that is not reflected in the written text of the Agreement. I am satisfied that the Agreement reflects the exclusive record of the bargain that Denise and Don negotiated through their lawyers and was reduced to writing.

Life Insurance

[28] There are a number of cases in which an individual has failed to maintain an insurance policy required by contract, and in which the intended beneficiary has been entitled to relief.

[29] In the 1995 Supreme Court of British Columbia case ***Fraser v. Fraser***, 1995 CanLII 1594 (BC SC), 16 R.F.L. (4th) 112, the court ordered specific performance of the defendant's covenant, as contemplated in the parties' separation agreement, to maintain a life insurance policy naming the plaintiff as a beneficiary (at para. 25).

[30] In the 2001 Alberta Court of Queen's Bench case ***Adams v. Adams Estate***, 2001 ABQB 173 (CanLII), 15 R.F.L. (5th) 237 (Alta. Q.B.), the Alberta Court of Appeal held that the deceased's estate was liable for the failure of the deceased to maintain a life insurance policy naming his children as beneficiaries. The court awarded damages in an amount equalling the full value of the life insurance policy (see paras. 10 and 15).

[31] There is no ambiguity about the life insurance policy in the Agreement. I am ordering Don to obtain and maintain a life insurance policy on his life in the amount of $200,000 within 30 business days of the signing of my order, naming Kelly as the irrevocable beneficiary, and that he must provide evidence that the policy remains in good standing on an annual basis thereafter. Kelly should also have the right to contact the insurance provider directly at any time, in order to confirm the existence and good standing of the policy.

[32] In the event that Don is unable or unwilling to obtain a life insurance policy within 30 business days of my order, Don will be obligated to pay damages to Kelly in the amount of $200,000.

The Condominium Down Payment

[33] There was considerable argument as to how to properly describe the $20,000 payment that Don made to Denise for the down payment of her condominium. This $20,000 payment occurred after the Agreement was signed. At paragraph 7, the Agreement explicitly gives Don the right to accelerate or increase the installment payments or pre-pay the entire amount owing at any time.

[34] The problem for the plaintiffs is that there is nothing on the evidentiary record that effectively challenges or contradicts the assertion in Don's affidavit that the $20,000 payment was intended to reduce his indebtedness to Denise and that it was not a gift. Kelly's recollection that Denise mentioned this was a gift, during cross-examination, is insufficient proof.

[35] I do not see how the estate as the moving party on a summary judgment motion can establish its entitlement to payment on the limited facts entered into evidence before me. That part of the estate's claim for damages must fail.

Conclusion

[36] My order is as follows:

1. The plaintiffs are entitled to damages from the defendant in the sum of $110,850, which is calculated by subtracting the $20,000 downpayment for

the condominium from the agreed amount of liquidated damages, namely $130,850.

2. Within 30 days of the signing of this order, Don will provide proof that he has named Kelly as the beneficiary of a life insurance policy on his life that provides for a payment at least $200,000 on his death, and he will provide proof that the policy remains in good standing on an annual basis thereafter.
3. Don will provide a written authorization to Kelly, permitting her to inquire about the status of the above noted policy at any time.
4. In the event that Don is unable or unwilling to provide proof of the existence and good standing of the life insurance policy required by my order within 30 business days of signing, he will be required to pay $200,000 in damages to Kelly.
5. The parties can book a half-day before me to argue the issue of costs if they cannot agree.

REMPEL J.