

CITATION: Tollinsky v. Tollinsky, 2011 ONCA 35  
DATE: 20110117  
DOCKET: C52241

COURT OF APPEAL FOR ONTARIO

Weiler, Gillese and Blair JJ.A.

BETWEEN

Norman Tollinsky

Applicant (Respondent)

and

Nhu Tollinsky

Respondent (Appellant)

Nhu Tollinsky, acting in person

Audrey A. Shecter, for the respondent

Heard and released orally: January 13, 2011

On appeal from the order of Justice Jane E. Kelly of the Superior Court of Justice, dated May 13, 2010.

ENDORSEMENT

[1] The appellant sent an Offer to Settle to the respondent to resolve all property and support claims arising from their divorce proceedings. The main substance of the settlement agreement was that the respondent would pay off the mortgage and transfer his

full interest in the matrimonial home to the appellant in return for the discharge of all property and support claims.

[2] The appellant submits that the acceptance prepared by respondent's counsel included two modifications that do not correspond with the terms of her Offer: a clause about tools and another provision stating, "There are no arrears of spousal support owing". She submits that the acceptance was therefore a counter-offer. Accordingly, she submits that the motion judge erred in finding that a contract had been formed and in granting the respondent's motion for an order in accordance with it.

[3] This argument was not raised before the motion judge. In any event, the modifications did not constitute a counter-offer. Paragraph 5 of the appellant's offer states: "The respondent/wife releases and forever discharges the applicant/husband from all claims with respect to net equalization of family property and/or spousal support." The provision in the acceptance stating, "There are no arrears of spousal support owing", only reiterated a major term of the settlement offer that the appellant had made to the respondent.

[4] The added provision in the acceptance about ownership of tools was minor and did not modify the main substance of the settlement agreement, which was the transfer of the matrimonial home in return for the discharge of all support claims.

[5] The appellant further submits that the offer was not accepted in time. We agree with the motion judge that acceptance of the offer was communicated on February 17, 2007, within the time for its acceptance. The appellant's response on February 18 saying, "I think you forgot to attach the order" confirms that she also thought the offer was accepted.

[6] The motion judge made no error in her findings and she applied the correct contractual legal principles.

[7] We must also deal with the appellant's motion to admit fresh evidence. The proposed "fresh evidence" is repetitive and does not comply with the *Palmer* test for the admission of fresh evidence.

[8] The appeal is therefore dismissed. The costs of the appeal are to the respondent. Having regard to the fact that the costs of the motion were fixed at \$5,000, we award costs fixed in the amount of \$7,500 inclusive of disbursements and applicable taxes.

"Karen M. Weiler J.A."  
"E.E. Gillese J.A."  
"R.A. Blair J.A."