

Case Name:
D.C. v. D.C.

Between
I.D.C., Applicant (Respondent in Appeal), and
R.M.D.C. and S.R., Respondents
(Appellant)

[2009] O.J. No. 4843

2009 ONCA 798

Docket: C50503

Ontario Court of Appeal
Toronto, Ontario

D.R. O'Connor A.C.J.O., R.G. Juriansz and P.S. Rouleau JJ.A.

Heard: October 30, 2009.
Oral judgment: October 30, 2009.
Released: November 12, 2009.

(6 paras.)

Creditors and debtors law -- Execution -- Priorities -- General principles -- Priority of support and maintenance orders -- Appeal by judgment creditor from decision of motions judge that outstanding child support arrears payable to the mother took priority over the appellant's claim against the father's interest in the sale proceeds from the matrimonial home -- Appeal dismissed -- The outstanding child support arrears took priority over the appellant's claim -- Mother not unjustly enriched.

Family law -- Marital property -- Matrimonial home -- Third party claims -- Appeal by judgment creditor from decision of motions judge that outstanding child support arrears payable to the mother took priority over the appellant's claim against the father's interest in the sale proceeds from the matrimonial home -- Appeal dismissed -- The outstanding child support arrears took priority over the appellant's claim -- Mother not unjustly enriched.

Appeal by judgment creditor from decision of motions judge. The mother had sought an order to pay out the proceeds of the sale of the matrimonial home to her pursuant to an earlier order. In her motion the appellant had sought to enforce the judgment she had ob-

tained, subsequent to the order against the father, for monies loaned and not repaid. Approximately \$25,000 of some \$56,000 had been used to pay down the mortgage on the matrimonial home, which at the time was in default. The property was registered solely in the father's name. The mother was unaware of the loan. The motions judge divided the property and ordered that child support arrears be paid from the father's one-half interest in the sale proceeds.

HELD: Appeal dismissed. The outstanding child support arrears took priority over the appellant's claim against the father's interest in the sale proceeds. As to the appellant's claim of unjust enrichment, there was a juridical reason for the enrichment, namely the borrowing of funds by the father, and the subsequent application of those funds to the mortgage. The appellant did not have a claim on the sale proceeds based on unjust enrichment.

Appeal From:

On appeal from the order of Justice Ferrier of the Superior Court of Justice dated April 16, 2009, [2009] O.J. No. 1542.

Counsel:

Mark R. Mancini, for the appellant.

Steven Benmor, for the respondent.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT (orally):-- The appellant brought a motion within the respondent wife's motion in which the wife sought an order paying out the proceeds of the sale of the matrimonial home to her pursuant to the earlier order of Justice Goodman. In her motion, the appellant sought to enforce the judgment she had obtained subsequent to the order of Justice Goodman against the respondent husband for monies loaned and not repaid. Approximately \$25,000 of some \$56,000 had been used to pay down the mortgage on the matrimonial home, which at the time was in default. The property was registered solely in the husband's name. The wife was unaware of the loan. Subsequent to the making of the loans, Justice Goodman divided the property and ordered that child support arrears be paid from the husband's one-half interest in the sale proceeds.

2 We agree with the motion judge that pursuant to s. 4 of the *Creditors' Relief Act*, the outstanding child support arrears took priority over the appellant's claim against the husband's interest in the sale proceeds.

3 The appellant claimed against the wife's interest in the sale proceeds by invoking unjust enrichment. The appellant now argues that unjust enrichment is a cause of action and not a remedy and that as such the motion judge should not have considered and rejected it. She now wishes to assert a claim based on unjust enrichment in a different proceeding.

4 Whether the motion judge considered unjust enrichment as a cause of action or a remedy does not matter. He properly analyzed and applied the elements that underlie unjust enrichment. He found that there was an enrichment of the wife and a corresponding deprivation of the appellant. However, he also found that there was a juridical reason for the enrichment, that being the borrowing of funds by the debtor, the husband, and the subsequent application of those funds to the mortgage. Thus, he held that the appellant did not have a claim on the sale proceeds based on unjust enrichment. We see no basis to interfere with his conclusion.

5 In this court, the appellant advanced an argument that she was entitled to an equitable lien against the property. The appellant, however, did not advance an equitable lien argument before the motion judge. On this record, we do not think it proper for us to entertain it.

6 In the result, the appeal is dismissed. We are satisfied that this is a proper case for partial indemnity costs. We fix the costs to the respondent in the amount of \$6,500, inclusive of disbursements and GST.

D.R. O'CONNOR A.C.J.O.

R.G. JURIANSZ J.A.

P.S. ROULEAU J.A.