

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

**RE: I.D.C., Applicant, and
R.M.D.C and S.R.,
Respondents**

[2009] O.J. No. 1542

Court File No: FS-05-13389FIS

Ontario Superior Court of Justice

L.K. Ferrier J.

Heard: March 26, 2009.
Judgment: April 16, 2009.

(28 paras.)

Creditors and debtors law -- Execution -- Priorities -- General principles -- Priority of support and maintenance orders -- Motion by husband's judgment creditor to enforce judgment against husband's share of sale proceeds of matrimonial home dismissed -- Wife had order that husband pay arrears of support exceeding his share of proceeds -- Support order took priority over creditor's judgment -- Creditor failed to show wife unjustly enriched -- Creditors' Relief Act, s. 4.

Family law -- Marital property -- Matrimonial home -- Third party claims -- Motion by husband's judgment creditor to enforce judgment against husband's share of sale proceeds of matrimonial home dismissed -- Wife had order that husband pay arrears of support exceeding his share of proceeds -- Support order took priority over creditor's judgment -- Creditor failed to show wife unjustly enriched.

Motion by R. for payment of a debt owing to her by the husband from his share of the proceeds of sale of the matrimonial home. The parties divorced in 2005 and the wife obtained a judgment against the husband, granting her a one-half interest in the home and ordering him to pay arrears of support from his share of the sale proceeds. R. had lent the husband \$56,000 pursuant to two promissory notes. The husband had applied a portion of that amount to the mortgage on the matrimonial home, and spent the rest on his daughter's tuition, a computer for his daughter and other family expenses. R. obtained judgment against

the husband in 2008 for \$57,452 plus costs. When the home was sold, the husband and wife were entitled to \$47,351. This exceeded the amount of arrears the husband was obliged to pay the wife.

HELD: Motion dismissed. The wife was entitled to the entire amount of the husband's share of the sale proceeds of the matrimonial home. The wife's support arrears claim took priority over R.'s judgment against the husband. Although R. established the wife was enriched by the amount she paid the husband and established she suffered a corresponding deprivation, there was a juridical reason for the enrichment, namely, the fact the husband borrowed the money to pay down the mortgage. As for the amounts advanced to the husband that he spent on other expenses, R. failed to show the wife was enriched.

Statutes, Regulations and Rules Cited:

Creditors' Relief Act, R.S.O. 1990, c. C.45, s. 4

Counsel:

Steven Benmor, for the Applicant.

John P. Schuman, for the Respondent, R..

ENDORSEMENT

1 L.K. FERRIER J.:-- The Applicant wife and Respondent husband (the "Respondent") were divorced April 2005. On May 3, 2005 the Applicant obtained a C.P.L. which was requested against their matrimonial home. She claimed a 50% interest in the home. Part of her application claimed arrears of child support and payment of other miscellaneous claims.

2 The Respondent husband ignored the proceedings and the claims were heard in an uncontested trial before Goodman J. on September 20, 26 and October 5, 2007.

3 Judgment was granted on March 23, 2008 awarding the Applicant a 1/2 interest in the home plus fixing child support arrears and ordering payment of other items. These monetary awards were ordered to be paid out of the Respondent's share of the net proceeds of the sale of the matrimonial home.

4 The mortgage on the property fell into arrears and the mortgagee took foreclosure and sale proceedings.

5 By the time this motion was argued and the dust had settled, after payment of all outstanding encumbrances, there remained \$94,682.95 in net proceeds to divide between the Applicant and the Respondent.

6 The Respondent did not appear on this motion, but a creditor of the Respondent did, one S.R.. Ms. R. had lent the Respondent \$56,000 pursuant to two promissory notes and she seeks that sum from the proceeds of sale.

7 The first promissory note was dated October 25, 2007 for \$25,000. The mortgage on the matrimonial home had fallen into arrears and the Respondent borrowed that sum to bring the mortgage into good standing. The funds were forwarded directly to the solicitors for the mortgagee and so applied.

8 Subsequently, the Respondent borrowed an additional \$31,000 from Ms. R.. In this respect, Ms. R. obtained credit cards in her name with the Respondent as a supplementary card holder. He used the cards to the extent of \$31,000 and was to pay off these sums, but did not do so.

9 Ms. R. obtained a second promissory note for \$56,000, undated, which included the earlier sum borrowed. The Respondent used the cards in some respects to pay tuition for the parties' daughter, a computer for her, and other such expenses.

10 Ms. R. sued the Respondent, the Applicant and the parties' daughter, by claim issued July 2008. To expedite matters, she discontinued against the Applicant and the daughter. She obtained default judgment against the Respondent on October 31, 2008 for \$57,452.11 plus \$1,150 costs.

11 On November 3, 2008, a writ of seizure and sale was filed with the Sherriff by Ms. R..

12 The judgment of Goodman J. provides that, from the Respondent's share of the proceeds, after payment of outstanding encumbrances, shall be paid the arrears of child support, which now total \$54,740.

13 One half of the net proceeds in trust is \$47,341. Thus, the child support arrears would wipe out the Respondent's share, leaving nothing to apply against the debt to Ms. R. (see Section 4, *Creditors' Relief Act*).

14 Ms. R. argues that the Applicant is without standing to enforce the support order (arrears) because of section 6(7) of the FRSAE S.O. 1996.

15 But that section only applies to orders that are filed with F.R.O. There is no evidence that the order in question was filed with F.R.O. Thus, section 6(7) has no application.

16 Ms. R. also argues that when one or both spouses obtain a loan to bring the mortgage on the matrimonial home into good standing, that loan is a debt of both parties because they both obtain a benefit from the loan.

17 Counsel cites para. 13(1) of the Judgment of Goodman J. of March 23, 2008. That is no authority for the proposition. Goodman J. held that the \$6,000 loan in question was made to the parties jointly.

18 The other case cited is *Mark v. Parotta-Mark*, [1997] O.J. No. 5578, 1997 CarswellOnt 4041, para. 46 at 96 (S.C.J.). But that case does not support the proposition either. There it was held that *both* spouses asked the debtor for the loan, it was not a gift, and on the facts, it was held to be loan that was made by *both* spouses.

19 Here, there is no evidence that the Applicant was even *aware* of the loans.

20 Ms. R. argues that the amount of the debt should come off the top of the proceeds.

21 As to the Respondent's half share of the proceeds, the outstanding child support arrears take priority: Section 4, *Creditors' Relief Act*.

22 As to the Applicant's half share of the proceeds, the only basis upon which recovery could be made against the Applicant would be upon the basis of unjust enrichment.

23 To succeed on such a claim, Ms. R. must establish:

- 1) an enrichment to the Applicant.
- 2) a corresponding deprivation or subtraction of wealth in Ms. R..
- 3) that there is no juridical reason for the enrichment.

24 In reference to the first \$25,000 of the debt, Ms. R. can establish the first and second requirements, but fails on the third. There is a juridical reason for the enrichment: the borrowing of funds by the debtor, and the subsequent application of those funds to the mortgage.

25 In reference to the balance of \$31,000 of the debt, Ms. R. fails on the first requirement; the applicant was not enriched.

26 Accordingly, Ms. R. cannot execute against the Applicant's half.

27 Order to go that the entire remaining proceeds of sale be paid to the Applicant.

28 I will hear oral submissions as to costs on April 28, 2009 at 10:00 am.

L.K. FERRIER J.