

**CITATION:** Ivancevic-Berisa v. Berisa, 2012 ONSC 4943  
**COURT FILE NO.:** FS-12377841  
**DATE:** 20120830

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** SUZANA IVANCEVIC-BERISA, Applicant

**AND:**

RUSTEM BERISA, Respondent

**BEFORE:** Justice Spies

**COUNSEL:** *Natalia Denchik*, for the Applicant

Rustem Berisa, Respondent-In-Person/Self-Represented

**HEARD:** August 28, 2012

**ENDORSEMENT**

[1] The Applicant Wife brought a motion for an order dispensing with the Respondent Husband's spousal consent with respect to all documents necessary to give effect to the sale of the matrimonial home municipally known as 86 Albert Avenue, Toronto ("matrimonial home") and allowing her to arrange showings of the matrimonial home. In other words, she sought carriage of the sale of the matrimonial home. In addition she sought an order that the matrimonial home and its contents be preserved.

[2] After hearing submissions from counsel for the Wife and the Husband who was self represented I ordered that:

1. Pursuant to section 23(b) of the *Family Law Act* the Applicant is permitted to proceed with the sale of the matrimonial home at 86 Albert Avenue, Toronto since the Respondent is unreasonably withholding his consent and interfering with her efforts to sell the property despite the terms of the Separation Agreement executed July 19, 2010 that the home be sold by July 2011.
2. The Applicant shall use the agent she proposes; Pat Duthie, and list the home on MLS for \$530,000.
3. The Applicant may sign the listing agreement with the agent without the consent or signature of the Respondent provided that the total commission is 3.5%.

4. The Applicant may arrange showings of the home through the agent on 24 hours notice by email to the Respondent at [rberisa@hotmail.com](mailto:rberisa@hotmail.com).
5. The Respondent's spousal consent with respect to all documents necessary to effect the sale of the matrimonial home is dispensed with.
6. The proceeds of sale after all closing costs shall be held in trust by the Applicant's real estate lawyer. If the parties cannot agree on the payment out, a further motion may be brought.
7. The Respondent may remain in possession of the matrimonial home pending closing providing he cooperates as required by this order.
8. The Respondent shall preserve the matrimonial home and its contents. The Respondent shall keep the home clean and presentable for showings.
9. Approval of the draft order by the Respondent is dispensed with provided I sign the order.
10. Costs in the amount of \$1,800 to be paid by the Respondent to the Applicant.

[3] I advised the parties that I would provide written reasons for my decision. These are my reasons.

[4] The Wife commenced an application for divorce and other relief on April 24, 2012 which was served on the Husband on April 29, 2012. The relief requested included the relief sought on this motion namely a court order for sale of the matrimonial home and an order dispensing with the Husband's consent to any documents pertaining to the sale of the matrimonial home. She set out the facts she relied upon to support her claim including the fact that the parties had executed a Separation Agreement on July 19, 2010 pursuant to which the parties agreed that the matrimonial home would be sold no later than one year after execution of the Separation Agreement. The Wife pleaded that notwithstanding numerous requests to list the house for sale, after she moved out of the house on August 12, 2010, the Husband had demonstrated "militant resistance to list the house for sale".

[5] The Separation Agreement was attached to the application. It provides that the Husband and Wife hold the matrimonial home in joint tenancy, that the contents of the matrimonial home have been divided between the parties and that "on or after the 5<sup>th</sup> day of August, 2010, the matrimonial home shall be listed for sale and sold as soon thereafter as is reasonable (but not later than one year from the date on this Agreement)." The Agreement goes on to provide that after selling costs and fees the proceeds be divided equally between the parties. The Separation Agreement permitted the Husband to remain living in the house until it was sold. He was required however, to take sole responsibility for payment for utilities and the property tax on the matrimonial home. There is no mortgage on the home.

[6] On April 29, 2012, the Husband was also served with, among other documents, notice of a case conference which was held before Justice Archibald on July 11, 2012. Justice Archibald made a consent order providing that the costs of an appraisal of the matrimonial home up to \$400 be split by the parties and that the Husband pay his \$200 share within 7 days of receiving the bill. The consent order provided that the appraiser be selected by the Wife and that the appraiser have access to the matrimonial home during a specified period of time.

[7] The Wife's notice of motion, affidavits in support and factum were served on the Husband by courier sent to the matrimonial home and the package was delivered on August 16, 2012. There had therefore, not been any short notice of the motion material.

[8] In the Wife's supporting affidavit sworn August 13, 2012, she set out her evidence as to how the Husband had refused to cooperate with her to put the matrimonial home up for sale, that he had communicated to her that he does not intend to sell the property and that he intends to keep it for himself as well as the fact that he has told her he intends to destroy all renovations and upgrades that were made to the house after it was purchased in 1996. Her affidavit also set out that an appraisal was done and that the Wife had paid the appraisal costs in full and that the Husband had refused to pay his share. She expressed her concern that the Husband would frustrate all potential showings and would not be cooperative with the real estate agent. On July 23, 2012, the date of the appraisal of the house, the Husband refused the Wife access to the matrimonial home.

[9] The Wife also filed in support of her motion an affidavit sworn August 13, 2012 by Pat Duthie, the real estate agent she wishes to use to list the matrimonial home for sale. Ms. Duthie attached to her affidavit a copy of the appraisal of the property as of July 23, 2012, conducted by Beth Marshall of In House Appraisal Corporation. Ms. Marshall appears to have done a complete appraisal and determined that in her opinion the market value of the matrimonial home is \$530,000. Ms. Duthie deposed that based on this, she was retained by the Wife, who signed a listing agreement with her, to list the matrimonial home for sale for \$530,000; the appraised value, and that it would be placed on MLS and that the agent would receive a total commission of 3.5% with 2.5% of that amount going to the selling agent. Ms. Duthie is offering full service for this price. In addition this agent is the one the parties used when they purchased the matrimonial home and over the years she deposed that she has taken them out to look at other properties. She has 20 years experience as a real estate agent and has a broker licence.

[10] Ms. Duthie deposed that on August 8, 2012 she went with the listing agreement to the matrimonial home and spoke to the Husband. She deposed that he refused to sign the listing agreement and that he told her he does not intend to sell the matrimonial home but rather intends to keep it for himself. She also deposed that he advised her that he would destroy all renovations and upgrades which were made after the house was purchased in 1996.

[11] Although the Husband did attend the case conference, he had not filed an answer or any responding material to the motion. He confirmed the statement of Ms. Denchik, that Justice Archibald had urged him to get legal counsel, but advised the court that he did not qualify for legal aid and had not been able to retain counsel. Prior to the argument of the motion the

Husband was permitted an opportunity to speak to Duty Counsel, but he told me that he was advised that he did not qualify. I understand, however, that he did receive some advice from Duty Counsel. I advised him that I did not want to hear what that advice was as that would be subject to solicitor-client privilege.

[12] The Husband confirmed on the record that he executed the Separation Agreement attached to the application and that the matrimonial home is held as a joint tenancy. He also made it very clear in his submissions to me that he has no intention of selling the home despite his agreement to do so as reflected in the Separation Agreement.

[13] Early on in the Husband's submission, he requested an adjournment of the motion, which I denied. In my view given the delay that has occurred to date in the sale of the home, which the parties agreed to some time ago and the uncontested evidence of both the Wife and Ms. Duthie, of threats made by the Husband to destroy parts of the property, there is urgency to the motion. Clearly the Husband has no incentive to leave the matrimonial home where he has effectively had exclusive possession for two years. Furthermore, although the Husband is self-represented, that is quite common in this court and there is no reason why he could not have complied with the clear notice in the application to respond with an answer within 30 days if he intended to dispute the claim made by the Wife. He failed to do so and as the application warned him, faced the risk that the case would go ahead without him. He has provided no explanation for his default. It was only because he attended the case conference and attended before me on the motion, that I permitted him to make submissions. He is otherwise in default and the Applicant would have been entitled to proceed on an uncontested basis.

[14] The Husband made lengthy submissions which were all based on information that he had not presented in evidence before the court. Naturally, Ms. Denchik objected and submitted that she was caught by surprise and prejudiced. I advised the Husband on a number of occasions that I could not receive information from him as evidence. Nevertheless I proceeded to hear his submissions. He suggested that the appraised amount was too high, but I pointed out to him, that that could hardly be a complaint as it might result in the property being sold for a larger amount than he anticipated. It appears, however, his concern about the appraisal is tied to his position that the Wife should allow him to buy out her interest. He confirmed there was no written agreement to this effect apart from an exchange of emails which had not been provided to the court.

[15] There is some reference to an attempt to resolve this issue in 2011 set out in the Wife's application, which is also not evidence. In my view, given the clear hostility between the parties, and the reluctance of the Husband to move from the matrimonial home, where he has resided since separation in August 2010, there is no basis to compel a new agreement between the parties, when they have not been able to reach one. The terms of the Separation Agreement clearly govern. The Husband has not suggested that he has any issue with the enforceability of that agreement. Rather he would prefer to be permitted to buy out the Wife. That, however, has not been agreed to between the parties.

[16] Pursuant to section 23(b)(iii) of the *Family Law Act*, the court may, on application of a spouse, by order, authorize the disposition of the matrimonial home if the court finds that the spouse whose consent is required is unreasonably withholding consent. The Husband has known since April 29, 2012, that the Wife had finally decided to take action with respect to his refusal to cooperate in the sale of the matrimonial home, which by virtue of the terms of the Separation Agreement, ought to have been done before July 2011. He has had ample time to find new accommodation. Pursuant to the Separation Agreement, the Wife is solely responsible for all expenses pertaining to the children's education and other extra-curricular activities. Although the older child is independent, the parties have a 20 year old son who is attending Waterloo University and lives with the Wife during the summer break. The Husband has not filed any material in response to the application or this motion. There is no triable issue in this case. Although I heard the Husband's submissions, given his failure to respond to the application, and his failure to comply with the consent order of Archibald J., and the uncontested evidence of both the Wife and Ms. Duthie, I concluded that the request for relief ought to be granted and I made the order as set out above.

[17] After reading out my order to the parties I advised the Husband that if he complied with my order he would be able to remain in the matrimonial home until closing. There was no request for an order now that he vacate the matrimonial home but I explained to the Husband that if he did not comply with all of the terms of the order, he could expect the Wife to seek an order for exclusive possession of the matrimonial home and that he might also face contempt proceedings which can have a very serious outcome.

[18] After I made my order, the Wife's counsel prepared a bill of costs setting out substantial indemnity costs in the amount of \$2,531.00 for eight hours of time at her hourly rate of \$280.00. She is a 2005 call. In my view the time and hourly rate is reasonable. I decided to award costs of \$1,800 on a partial indemnity basis, notwithstanding the egregious conduct of the Husband.

[19] The Wife may proceed on further evidence with an uncontested trial for the balance of the relief sought in her application. She does not need to provide any further notice to the Husband.

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SPIES J.

**Date: August 30, 2012.**