

**NOVA SCOTIA COURT OF APPEAL**  
**Citation:** *Moore v. Darlington*, 2016 NSCA 68

**Date:** 20160915  
**Docket:** CA 450760  
**Registry:** Halifax

**Between:**

David Moore and Sand, Surf & Sea Limited,  
a body corporate

Appellant

v.

Michelle Darlington

Respondent

**Judge:** The Honourable Justice David P. S. Farrar, J.A.

**Motion Heard:** September 1, 2016, in Halifax, Nova Scotia in Chambers

**Held:** Motion dismissed

**Counsel:** Appellant, in person  
Peter D. Crowther and Alix Digout (Articled Clerk), for the  
respondent

## **Decision:**

### **Background**

[1] The appellant, David Moore, and the respondent, Michelle Darlington, separated on December 22, 2009. Since then, they have been involved in litigation with respect to issues arising from their relationship, including parenting, support (both child and spousal), and division of property.

[2] The issues were initially determined by Justice Mona Lynch (2011 NSSC 152). Justice Lynch's decision was overturned on appeal and remitted for retrial (2012 NSCA 68).

[3] The retrial was heard before Associate Chief Justice Lawrence I. O'Neil. It extended over nearly three years requiring twelve days of court time; resulting in four written decisions with a final written decision dated May 1, 2015 (2015 NSSC 124).

[4] The retrial before O'Neil A.C.J. also included a claim by Mr. Moore's company Sand, Surf & Sea Limited against Ms. Darlington for amounts Sand, Surf & Sea Limited alleged were owing to it.

[5] Sand, Surf & Sea Limited's claim was dismissed by O'Neil A.C.J.

[6] Both Mr. Moore and Sand, Surf & Sea Limited appeal the trial judge's decision citing some 15 grounds of appeal.

[7] On June 8, 2016 the appellants, then represented by Richard A. Bureau, filed a motion for a stay in this Court. The motion sought to stay clause 7 of O'Neil A.C.J.'s order dated April 1, 2016 which provides:

The matrimonial home shall be listed for sale on or before the close of business on Friday, May 15<sup>th</sup>, 2015.

[8] The stay motion was originally scheduled to be heard on June 16, 2016 in chambers but was adjourned to June 23, 2016.

[9] Just shortly before chambers commenced on June 23, Mr. Bureau informed the Court that the parties had reached a settlement and that a consent order would be forthcoming. A consent order was not filed.

[10] On August 4, 2016 Mr. Moore, now representing himself and Sand, Surf & Sea Limited, filed another motion seeking “a stay of the lower court decision under appeal in this matter”.

[11] Although his notice of motion is general, in the affidavit filed in support of the motion, Mr. Moore says:

6. THAT I am making this motion for a Stay of Execution regarding the above, namely that the Respondent shall be stayed from collecting spousal maintenance in the amount of \$1,700.00 per month and that the Respondent shall be stayed from listing the property for sale and from effecting the sale.

[12] By the time the matter was heard by me on September 1, 2016, Mr. Moore’s request for a stay had expanded to three elements of O’Neil A.C.J.’s order:

1. Listing the matrimonial home for sale;
2. Payment of spousal support; and
3. The division of RRSPs.

[13] For the reasons that follow, I would dismiss the motion with costs payable to Ms. Darlington in the amount of \$1,500 payable forthwith in any event of the cause.

### **Issues:**

[14] As a result of the manner in which this matter unfolded, there are two separate issues that arise on this motion:

1. Whether the parties reached an agreement on the terms of a stay on June 23, 2016?
2. If not, have the appellants satisfied the necessary requirements for a stay?

### **Analysis**

#### *The Agreement*

[15] As noted earlier, the motion to stay the listing of the matrimonial home was scheduled to be heard in June of this year. The parties purportedly reached agreement with respect to that motion. Mr. Moore now resiles from that agreement saying that it was contingent upon his income not being garnisheed through the

Maintenance Enforcement Program. At the hearing of the stay application, Mr. Moore produced evidence which indicated that his income would be garnisheed in the amount of \$1,700 to pay support payments owing to Ms. Darlington commencing in September 2016. As a result, Mr. Moore says that the agreement reached on the previous motion is no longer in effect.

[16] Before entering into the agreement, Mr. Moore says he received assurances from Maintenance Enforcement that they would not garnishee his income.

[17] The purported agreement starts with an email from Mr. Crowther, solicitor for Ms. Darlington, to Mr. Bureau which provides:

Ms. Darlington is prepared to agree to have the proceeds from the sale of 141 Lakeshore held in escrow pending the outcome of the appeal. All other terms of Order of Justice O'Neil shall remain.

Please advise if this acceptable to your client. If accepted, we can attend the Court of Appeal this afternoon and you can withdraw the motion for the stay of execution and we can set filing dates and hearing dates. [Emphasis added]

[18] Later that morning, Mr. Bureau responds as follows:

We would agree to the terms with the following changes:

1. The property would be listed for its Fair Market Value of \$750,000.00 (we are fine with the agent chosen by Ms. Darlington);
2. A neutral (third party) lawyer would handle the sale and the net proceeds (Sale price less adjustments, real estate commission, and legal fees) would be paid into Court at the time of the sale;
3. The Boyne Clarke Mortgage would be released from the property at the time of the sale without compensation to Boyne Clarke. No money from the sale of the property would go to David Moore, Michelle Darlington, Morris Bureau, or Boyne Clarke until further order of the Court.

If this is agreeable I will advise the court and we could attend to read the terms into the Court record and I would draft an order for signatures.

[Emphasis added]

[19] Mr. Crowther responds:

Trying to connect with the real [sic] agent on this. I propose that we adjourn the Motion for a Stay for next week if you agree. We could set the Appeal dates etc in the meantime.

[20] Just two minutes after that email, Mr. Crowther again emails Mr. Bureau saying:

Just heard from agent.

We are agreed.

[21] Mr. Bureau then advised the Court that the issues relating to the motion had been settled and a consent order was forthcoming.

[22] The agreement, Ms. Darlington says, is that she would allow the funds from the sale of the house to be held in trust by a neutral law firm pending the outcome of the appeal. However, in return, she required that all other provisions of the order to remain in force, including the payment of spousal support and the division of the RRSPs.

[23] Mr. Moore does not say that he did not agree to the terms of settlement; he argues, at the time he did so, he was under the impression that Maintenance Enforcement would not garnishee his income. Nor does Mr. Moore suggest that Mr. Bureau entered into an agreement which he did not authorize. His argument simply put is that the circumstances changed after the settlement was reached and, therefore, he feels he is no longer bound by it. Unfortunately for Mr. Moore, it was not a condition of the settlement that his income be free from garnishee by Maintenance Enforcement.

[24] This is not a case where there is a dispute between a solicitor and client as to whether or not an agreement was entered into (see, for example, *Newcombe v. Newcombe*, 2013 NSSC 183). All parties agree as to the terms of the settlement of the motion. Mr. Moore does not want to comply as a result of circumstances which were not conditions of the agreement. In my view, he cannot do so.

[25] Mr. Moore is bound by the agreement which was reached between his solicitor and Ms. Darlington's solicitor.

[26] It follows that Ms. Darlington is also bound by that agreement. The agreement, for clarity, is as follows:

1. The matrimonial home would be listed for its fair market value of \$750,000 with the agent chose by Ms. Darlington;

2. A neutral (third party) lawyer would handle the sale and the net proceeds (sale price less adjustments, real estate commission and legal fees) would be paid into the court at the time of the sale;
3. The Boyne Clarke mortgage would be released from the property at the time of the sale without compensation to Boyne Clarke. No money from the sale of the property would go to David Moore, Michelle Darlington, Morris Bureau or Boyne Clarke until further order of the Court; and
4. All other terms of the order of O'Neil A.C.J. would remain in full force and effect.

[27] As I have concluded that there is an agreement between the parties with respect to the stay, I would not permit Mr. Moore to re-litigate the issue at this time. For this reason alone, his motion is dismissed. However, I am also of the view that under the traditional analysis for a stay the motion will fail. I will now do that analysis.

#### *Requirements of a Stay.*

[28] The long established test in relation to a stay in this province is as follows:

1. There must be an arguable issue raised on appeal;
2. If the stay is not granted, the appeal is successful, the appellant would have suffered irreparable harm, which cannot be compensated by a damage award; and
3. The appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted. This is commonly known as the balance of convenience test.

Finally, if the appellant fails on the primary test as set out above, the Court may, in exceptional circumstances, stay the execution of the Order (*Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341).

#### *Arguable Issue*

[29] In his notice of appeal, Mr. Moore raises fifteen grounds of appeal. Although it is somewhat difficult at this stage of the proceedings to address the merits of the appeal, I am, at least, satisfied that Mr. Moore has raised an arguable issue in his grounds of appeal and I will not elaborate further.

*Irreparable Harm*

[30] Mr. Moore says that he will suffer irreparable harm if he has to pay spousal support. His argument goes something like this: if his income is garnisheed and he is unable to keep up the expenses on the house, he will be required to leave with no place to live. He also says that this is a unique property which cannot be replaced.

[31] Dealing with the latter argument first. Mr. Moore, back in June, agreed to allow the property to be sold and the funds to be held in trust. If the property were so unique, he would not have made that arrangement.

[32] What his argument really boils down to is that he is being garnisheed and that equates to irreparable harm. With respect, it does not.

[33] The evidence before me established that Mr. Moore, at present, is being garnisheed at \$1,700 per month. He was already paying Ms. Darlington \$900 per month in spousal support. The difference between pre and post garnishment amounts is \$800.

[34] Mr. Moore has not convinced me that he has an inability to pay this amount. He speculated that Maintenance Enforcement would take more of his income than simply the \$1,700. However, that has not occurred. The additional payment of \$800, in these circumstances, does not amount to irreparable harm.

[35] With respect to the RRSPs, Mr. Moore says that he would be unable to recover the amounts from Ms. Darlington should O'Neil A.C.J.'s decision be found to be in error. Once again, Mr. Moore has not convinced me that Ms. Darlington could not repay the amount of the RRSPs awarded to her if O'Neil A.C.J. is found to be in error (see *Fulton* at para. 29). It is a monetary sum which can be easily quantified.

[36] Finally, Mr. Moore's argument that he will be left out on the street with no place to live rings hollow. He and his present wife have access to a property in Sarasota, Florida which they live for a number of months for the year. There is no reason they could not live there for a period of time if the house sold. Also, as yet, there has not been an offer on the house and it would be some time before vacant possession of the property can be arranged and a sale completed. That should give Mr. Moore ample time to arrange alternate accommodations (see *Patriquen v. Stephen*, 2010 NSCA 67 at para. 12).

[37] I am not satisfied that Mr. Moore even comes close to establishing irreparable harm on this motion.

*Balance of Convenience*

[38] As I have found there is no irreparable harm, it is not necessary for me to address the balance of convenience part of the test.

**Exceptional Circumstances**

[39] As I found that Mr. Moore's stay motion does not meet the three-part test in *Fulton*, I will now turn to whether he has established exceptional circumstances. In *R. v. Innocente*, 2001 NSCA 97, Oland J.A. discussed exceptional circumstances:

[36] The judgment under appeal which is the subject of this stay application is an award of costs. Where a stay involves a judgment for costs or any other monetary sum, the appellant is normally required to meet the primary test and if the appellant fails to do so, it would be rare to find exceptional circumstances justifying the exercise of discretion in favour of granting a stay: *Lienaux et al. v. Toronto-Dominion Bank* (1997), 161 N.S.R. (2d) 236 (C.A.) at para. 15. ...

[40] The evidence submitted in support of this motion and the circumstances surrounding the proceedings to not give rise to any exceptional circumstances that would justify a stay.

[41] To the contrary, on this record it appears to me that Mr. Moore, at every turn, has attempted to avoid and delay the payment of spousal support and the ultimate conclusion of these proceedings. To illustrate, he has not paid the support ordered by O'Neil A.C.J. in the amount of \$1,700. In cross-examination on the motion when questioned by Ms. Darlington's counsel as to why he has not paid that amount, he replied, in a somewhat disrespectful manner (as if it should be known to Ms. Darlington's solicitor) that he was "appealing the decision."

[42] It is well-known that the filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from (Rule 90.41(1)).

[43] Mr. Moore by his conscious choice has not paid spousal support as ordered by O'Neil A.C.J. When Maintenance Enforcement garnisheed his wages to ensure that she was paid the \$1,700 per month, he then comes to this Court seeking an equitable remedy to prevent that from occurring.



[44] Mr. Moore also agreed to the sale of the house upon conditions, then comes before this Court arguing that the house is unique and he would suffer irreparable harm as a result of the house being sold. As noted earlier, this argument rings hollow considering he had agreed to the house being listed for sale in June 2016.

[45] I question Mr. Moore's motives and his conduct throughout these proceedings. The remedy sought by Mr. Moore is an equitable one. To be accorded such relief, he must come to the court with clean hands (see *E.B.F. Manufacturing Ltd. v. White*, 2005 NSCA 103 at para. 25). His conduct has dirtied his hands and, as such, he is not entitled to the equitable relief which he seeks. This is simply one more reason for refusing the stay in these circumstances.

### **Costs**

[46] The motion is dismissed with costs to Ms. Darlington in the amount of \$1,500, inclusive of disbursements, payable forthwith in any event of the cause.

Farrar, J.A.