SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Armoyan v. Armoyan*, 2015 NSSC 230

Date: 2015-07-29
Docket: *Halifax* No. 1201-065036
Registry: Halifax

Between:

Vrege Armoyan

Petitioner

v.

Lisa Armoyan

Respondent

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	July 29, 2015, in Sydney, Nova Scotia
Oral Decision:	July 29, 2015
Written Decision:	July 29, 2015
Counsel:	Vrege Armoyan, not present Harold Niman and Leigh Davis for Lisa Armoyan

By the Court:

Introduction

[1] Lisa and Verge Armoyan are divorced spouses. Mr. Armoyan owes Ms. Armoyan millions of dollars as a result of successful litigation in Florida and Nova Scotia. Mr. Armoyan refuses to pay Ms. Armoyan the vast majority of the monetary awards granted to her by the courts. Neither has Mr. Armoyan paid Ms. Armoyan the substantial costs orders which are outstanding.

[2] Ms. Armoyan has experienced significant difficulty collecting the judgements because of the conduct of Mr. Armoyan. Mr. Armoyan transferred approximately $30 million in assets off-shore and encumbered his assets which remained in the jurisdiction. The execution process was thus rendered meaningless.

[3] Mr. Armoyan also recently abandoned the Nova Scotia litigation. He states that he is no longer residing in Nova Scotia or Canada. He refused to appear at the contempt hearing held in April 2015; he refused to attend the penalty hearing held in June 2015.

[4] In response, Ms. Armoyan hired an international recovery team. The recovery team has located some of the assets which Mr. Armoyan removed from this jurisdiction. The recovery team retained independent legal counsel to enforce the judgements in the jurisdictions where the assets are located.

[5] Ms. Armoyan recently filed two motions to assist with the recovery efforts. The first motion deals with a request to proceed on an emergency, *ex parte* basis, without notice to the media and the public, *in camera*, and with all documents associated with the motions to be subject to a sealing order. In a second motion, Ms. Armoyan seeks to be relieved of the implied undertaking rule so that certain financial disclosure can be used by the recovery team in other jurisdictions.

[6] This decision will determine the appropriateness of these requests.

Issues

[7] I will determine the following issues in this decision:

- Should the motions proceed on an emergency, *ex parte* basis?

- Should a confidential order issue?
- Should Ms. Armoyan be relieved of the implied undertaking rule?

Analysis

[8] **Should the motions proceed on an emergency, *ex parte* basis?**

[9] Ms. Armoyan relies on **Civil Procedure Rules** 28.03 and 22.03 to support her request that the motions be processed on an emergency, *ex parte* basis. **Rule** 28.03 provides the court with the authority to grant an emergency, e*x parte* motion. **Rule** 22.03 provides guidance as to the types of situations which may necessitate the granting of an e*x parte* motion.

[10] I have considered these provisions, the evidence of Ms. Armoyan, and the submissions of counsel. I find that Ms. Armoyan has proven that the motions should proceed on an *ex parte*, emergency basis for the following reasons:

- Mr. Armoyan is not entitled to notice by virtue of the abuse of process decision reported at **Armoyan v. Armoyan**, 2015 NSSC 191 and order dated July 23, 2015 which struck Mr. Armoyan's pleadings.
- There are circumstances of sufficient gravity to justify the making of a motion without notice, because notice will likely lead to the destruction of evidence or other serious loss of property, and an *ex parte* order will likely avoid the destruction or loss: **Rules** 22.03(1)(e) and 22.03(2)(c). It is probable that Mr. Armoyan would once again transfer his assets should he become aware that Ms. Armoyan is seeking to enforce judgements in those jurisdictions where Mr. Armoyan's assets are currently situate. I make this finding given Mr. Armoyan's past litigation conduct as extensively reviewed in **Armoyan v. Armoyan**, 2015 NSSC 191. Although history may not be destiny[1], in this case, Mr. Armoyan's prior litigation conduct strongly signals that Mr. Armoyan will do all that he can to shelter his assets from execution. Similar considerations were approved as supportive of an *ex parte* order in **Juman v. Doucette**, 2008 SCC 8, para 50.

[11] **Should a confidential order issue?**

[1] Comments of Fichaud, J.A. in **S.A.D. v. Nova Scotia (Community Services),** 2014 NSCA 77 at para 82.

[12] **Rules** 59.60, 85.04, and 85.05 and s 37 of the **Judicature Act**, RSNS 1989, c 240 provide the court with the discretion to issue a confidential order by excluding the public and media, and by waiving notice to the media of the confidentiality request. Such remedies can only be granted if the court is satisfied that the need for confidentiality exceeds the public interest in having open and accessible court proceedings.

[13] The Nova Scotia Court of Appeal thoroughly reviewed the principles to be engaged in the resolution of this issue in its decision of **Coltsfoot Publishing Ltd. v. Foster-Jacques**, 2012 NSCA 83. Saunders, J.A. made the following relevant observations:

- The **Dagenais/Mentuck** line of authority governs the judge's discretion under Rule 59.60. The open court principle, although derived from the common law, is now constitutionally embedded in s 2(b) of the **Charter**. The court must comply with constitutional standards when exercising its discretion: para 24.

- The open court principle is "neither a recent nor an ill-suited arrival" to family law: para 76. "[A]ccountability of the justice system is a fundamental purpose of the open court principle": para 88. The open court principle applies to trial and pretrial stages of the proceeding, and includes documents filed by the parties with the court: para 89.

- The burden is on the moving party and is based on a balance of probabilities: paras 30 and 38. The evidentiary basis must include more than conclusory statements and bald assertions: paras 31 and 32.

- The court must apply a two part test. The court must first determine whether a sealing order is necessary to prevent a serious risk to an important interest, because reasonable alternative measures will not alleviate the risk. The important interest must be real, substantial and well-grounded in the evidence, and involve a general principle of significance to the public, not just of personal interest of the parties. The judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important interest that requires confidentiality. Secondly, the judge must be satisfied that the salutary effects of the sealing order outweigh its deleterious effects, that include a limitation on the constitutionally protected freedom of expression: para 27.

- Matrimonial authorities grant such relief where the evidence establishes a risk of harm, usually involving a risk to children, and that no reasonable measure would alleviate that risk: para 33.
- The court must determine if there are reasonable alternative measures that would alleviate the risk in the specific case: para 55. Redaction and a partial publication ban are possible alternative measures.

[14] Despite these strong comments, the Court of Appeal did not foreclose the availability of a sealing order in family proceedings at para 98, wherein Saunders, J.A. states in part, as follows:

> 98 That is not to say that a divorce file never may be subject to a partial or complete sealing order. I refer to the examples in the authorities set out earlier (para 33) that discuss various gradations of confidentiality orders. Such an order would require evidence that establishes a serious risk of harm beyond mere embarrassment, particularly but not exclusively where children are involved, and the inadequacy of alternative measures to alleviate that risk. …

[15] I have reviewed the affidavits of Ms. Armoyan, the submissions of counsel, the applicable **Rules** and case authorities. I find that Ms. Armoyan has proven on a balance of probabilities that a confidential order should issue, and that media notice of the request for confidentiality be waived for the following reasons:

- A sealing order is necessary to prevent a serious risk to an important interest. The important interest involves the administration of justice and the collection of maintenance and outstanding costs awards. Mr. Armoyan owes Ms. Armoyan in excess of $1.7 million in child and spousal support arrears. Mr. Armoyan owes Ms. Armoyan in excess of $1.3 million in outstanding costs, security for costs, suit costs and contempt penalties assessed by Canadian courts. Mr. Armoyan owes Ms. Armoyan in excess of $1.47 million in costs and forensic accounting fees awarded by the courts in Florida. Mr. Armoyan had the ability to pay these awards, and chose not to do so.
- Mr. Armoyan strategically transferred his property off-shore and encumbered the personal property that remained within the jurisdiction so that his assets would not be subject to execution. Mr. Armoyan also avoided personal penalties by failing to participate in the contempt proceedings and by abandoning the Nova Scotia litigation which he initiated. Mr. Armoyan's litigation conduct resulted in an abuse of process remedy because his

conduct was so tainted that it brought the administration of justice into disrepute, while compromising the integrity of the court's adjudicative functions.

- Ms. Armoyan is the custodial parent. She is in desperate need of the money which Mr. Armoyan owes her. Ms. Armoyan and the children have a right to the outstanding maintenance arrears. Ms. Armoyan has a right to collect the other monetary judgements.
- If Mr. Armoyan learns that the recovery team has located his assets and are attempting to freeze and enforce the foreign judgements, he will once again transfer the assets out of the reach of Ms. Armoyan and the courts. Ms. Armoyan is thus subject to pronounced prejudice. This concern is grounded in the evidence; it is not speculative, nor conclusory.
- This concern transcends the personal interests of the parties. The collection of child and spousal support arrears is a matter of significant public interest.
- A public hearing, which in the past has attracted much media attention, has the real risk of alerting Mr. Armoyan to the fact that the recovery team has located his off-shore assets and are taking steps to freeze and enforce the foreign judgements. A confidential order is necessary so that Ms. Armoyan and the children can enforce their legal rights.
- Reasonable alternative measures are limited based on the unique factual circumstances of this case. A media ban would not prevent a private citizen from commenting and alerting Mr. Armoyan about the recovery team's success.

[16] The following provisions will apply to the confidential order:

- The public, inclusive of the media, are excluded from the hearing of these motions. The hearing will be confidential pursuant to **Rule** 85.04(3) and s. 37 of the **Judicature Act**.
- The confidential order will only apply to the motions being decided today, and will not impact on the balance of the court's record pursuant to **Rule** 85.04 (1).
- The prothonotary and court administrator must temporarily seal all documents filed in support of these motions, and the decision and order which are released pursuant to **Rule** 85.04(2)(a).

- The prothonotary and court administrator must temporarily block public access to the recording of the motions hearing pursuant to **Rule** 85.04(2)(b).
- A temporary publication ban is issued in respect of the proceedings involving the two motions pursuant to **Rule** 85.04(2)(c).
- The notice requirement set out in **Rule** 85.05(1) is waived and a report of this decision will be filed with the prothonotary in Halifax in compliance with **Rule** 85.05(3), which report itself will be temporarily sealed pending further notice from this court.
- The confidential order will not be indefinite. The confidential order will be in effect until October 7, 2015, unless Ms. Armoyan makes further *ex parte* application to the court to show why the order should be extended. Thus, the public will eventually be made aware of the motions and decision.

[17] In summary, I find that Ms. Armoyan has met the test set out in **Rules** 59.60, 85.04, and 85.05 and s 37 of the **Judicature Act;** the temporary confidential order is granted in the manner described above. I am satisfied that the need for confidentiality exceeds the public interest in having open and accessible court proceedings. I find that the salutary effects of the sealing order outweigh its deleterious effects because of the temporary nature of the confidential order and in the circumstances of this case. The confidential order is not a bar to free expression, rather, the order simply delays the media's ability to report, and the public's right to know, until a later time when the prejudice to Ms. Armoyan and the children is no longer present. Such an approach will ensure that the demands of justice are fulfilled.

[18] **Should Ms. Armoyan be relieved of the implied undertaking rule?**

[19] **Rule** 14.03 references the common law principle of the implied undertaking rule and the jurisdiction of the court to grant relief from the rule.

[20] In **Juman v. Doucette, *supra***, the Supreme Court of Canada discussed the criteria to be applied on a motion to be relieved of the implied undertaking rule. Binnie, J. stated that the moving party must demonstrate, on a balance of probabilities, "the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation": para 32.

[21] Binnie, J. further looked to case law for guidance as to when the court should grant relief from the implied undertaking rule. Similarity of parties and actions generally will result in a waiver of the implied undertaking rule. Binnie J. states as follows at para 35:

> [35] The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted. See *Lac Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 1985 CanLII 2251 (ON SC), 50 O.R. (2d) 260 (H.C.J.), at pp. 265-66; *Crest Homes*, at p. 1083;*Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 1988 ABCA 282 (CanLII), 90 A.R. 323 (C.A.); *Harris v. Sweet*, [2005] B.C.J. No. 1520 (QL), 2005 BCSC 998 (CanLII); *Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd.* (1998), 27 C.P.C. (4th) 252 (B.C.S.C.).

[22] I have also reviewed the cases of **Fecteau v. Craft**, 2013 NBQB 123 and **Piche v. Chiu**, 2013 BCSC 747, which illustrate the favorable application of these principles.

[23] I find that Ms. Armoyan has proven on a balance of probabilities that she should be granted relief from the implied undertaking rule for the following reasons:

- The granting of Ms. Armoyan's request would further the interests of justice, while the failure to do so, could be construed as tactic approval and encouragement of Mr. Armoyan's obstructive behaviour.
- Ms. Armoyan engaged the services of an international asset recovery team. They have located some of the assets which Mr. Armoyan transferred from Nova Scotia during the course of these proceedings. The team is taking immediate action to freeze these funds for the satisfaction of the outstanding judgements that Ms. Armoyan has against Mr. Armoyan.
- The asset recovery team requires certain documents that demonstrate how and when the funds were transferred by Mr. Armoyan to their current location. Using this information, counsel in each jurisdiction can then take steps to freeze the funds. Some of the documents that will facilitate this process were disclosed by Mr. Armoyan in the Nova Scotia proceedings.

- Mr. Armoyan has taken numerous steps throughout these proceedings to divest himself of assets and move money off-shore. He has thus avoided the payment of Nova Scotia judgements which exceed $3.47 million.
- The proceedings involve the same parties and similar issues. Ms. Armoyan simply seeks collection of the monetary judgements granted to her from assets which existed prior to separation and which Mr. Armoyan strategically removed from this jurisdiction. Given the clear relationship between this proceeding and the proposed action in other jurisdictions, there is little prejudice to Mr. Armoyan.
- The public interest in ensuring Ms. Armoyan collects the fruit of the litigation, which include child and spousal support arrears, outweighs any value the implied undertaking rule is designed to protect, in the circumstances of this case.

[24] Ms. Armoyan is therefore relieved of the implied undertaking rule as it relates to the following documentation:

- Transfer authorization letters;
- Statement of foreign income/investment income – these statements were included in Mr. Armoyan's tax returns between the years of 2010-2013;
- Transcript of the January 14, 2011 hearing in Supreme Court (Family Division); and
- Vrege Armoyan's 2014 Statement of Property filed with the Court on February 13, 2014.

Conclusion

[25] Ms. Armoyan's motions to proceed on an emergency, *ex parte* basis are granted where Mr. Armoyan's pleadings have been struck and where notice will likely lead to the destruction of evidence or other serious loss of property, and an *ex parte* order will likely avoid the destruction or loss.

[26] Ms. Armoyan's motion for a temporary confidential order is granted. A confidential order which excludes the public and media from the motions hearing; which temporarily seals documents; which blocks public access to the recording of

the motions hearing; and which waives notice to the media is appropriate because the court is satisfied that the need for confidentiality exceeds the public interest in having open and accessible court proceedings. This order is subject to the conditions previously reviewed.

[27] Ms. Armoyan is granted relief from the implied undertaking rule as it relates to certain specified documents disclosed by Mr. Armoyan in the Nova Scotia litigation and which is intended to be used by Ms. Armoyan's asset recovery team in other jurisdictions where the team has located the assets which Mr. Armoyan removed from Nova Scotia.

[28] The public interest in ensuring Ms. Armoyan collects the outstanding judgements outweighs any value the implied undertaking is designed to protect, in the circumstances of this case.

[29] Ms. Davis is to prepare the order.

Forgeron, J.