

SUPREME COURT OF NOVA SCOTIA
Citation: *Arenburg v. Arenburg*, 2016 NSSC 177

Date: 20160530
Docket: Bwt No. 1203-003680
Registry: Bridgewater

Between:

Joanne Lynn Arenburg

Petitioner

v.

Darrell R. Arenburg

Respondent

Judge: The Honourable Justice C. Richard Coughlan

Heard: May 11, 2016, in Bridgewater, Nova Scotia

Decision: July 11, 2016 (**Orally May 30, 2016**)

Counsel: Michael K. Power, Q.C., for the Petitioner
Rubin Dexter, for the Respondent

By the Court:

[1] A party must disclose all documents in its control which are relevant to the issues before the court and answer at discovery questions concerning the relevant issues.

[2] In this case Darrell R. Arenburg moves for an order that Joanne Lynn Arenburg produce the following documents in her possession and control:

1. All monthly bank statements for those bank accounts in the name of the Petitioner for the period from January 1, 2013 to present;
2. All monthly VISA and other credit card statements for the Petitioner for the period from January 1, 2013 to present;
3. The application for financing/credit completed by the Petitioner in connection with the purchase by her of a 2014 Hyundai motor vehicle.

[3] Mr. Arenburg also seeks an order compelling Ms. Arenburg reattend her examination for discovery which took place on January 20, 2016, and answer questions which were objected to or taken under advisement, the questions arising therefrom, and questions arising from the documents sought to be produced, and directions as to the conduct and the trial of this proceeding.

[4] Mr. and Ms. Arenburg were married on September 28, 2000 and separated July 21, 2014. Ms. Arenburg filed a Petition for Divorce August 27, 2014.

[5] Ms. Arenburg gave evidence at a discovery examination on May 20, 2015. During the examination Mr. Arenburg's lawyer asked Ms. Arenburg about her income, including the following:

Q. What were your tips like when you were working as a waitress? Say a typical two weeks?

A. A typical...oh. It varied. There would be some, some weeks you'd make really good money and then other weeks you'd make very little.

Q. Did you report your tip income on your tax returns?

A. I did.

Q. So, do you have copies of your old tax returns?

A. They would be at Brian MacDougall's and he passed away, so I don't have, I don't have them, no. And that would have been five years ago, so.

Q. Well, you can get your tax summaries though from the Government.

A. Yeah.

Q. I'm going to ask you to get your tax summaries going back to...you became the manager four years ago?

A. Four years ago.

Q. So that would take us to 2011, correct?

A. Mm hmm. Yes.

Q. May of, starting that May of 2011? So, go back to 2005, would you?

A. Mm hmm.

Q. And I'm going to ask you to get the tax summaries.

A. Okay.

Q. So, and just so we're clear, what you would show on your tax summaries would be the, all of your employment income?

A. Yes.

Q. And that would have included working for the Pharmasave?

A. Yes.

Q. And it would have included tips as well?

A. Far as I know, yes.

Q. Okay. But I think you told me now that you're manager, you don't get tips any more?

A. I do not get tips, no.

Q. Is that the policy?

A. That is the policy.

[6] Ms. Arenburg was asked to produce and agreed to produce, certain bank statements, including her savings account at Scotiabank, the sales contract for the purchase of the 2015 Hyundai Genesis Coupe, and her income tax summaries for the years 2005 to 2011.

[7] Subsequently Mr. and Ms. Arenburg signed a partial separation agreement dated July 20, 2015 dealing with spousal support as follows:

6. The Husband is presently on long term disability and is in receipt of long term disability income benefits through his employer, Brooklyn Power, and has a current projected gross income from all sources in 2015 of \$40,584.00.
7. The Wife who is presently employed by as a manager the Quarterdeck Restaurant & Villa Inc. and has a projected gross income from all sources for 2014 of approximately \$29,606.00.
8. Based on said projected incomes for the parties, the mid-range of spousal support payable by the Husband to the Wife, as calculated in accordance with the *Spousal Support Advisory Guidelines* on a “without child support” formula, is \$324.00 per month.
9. Commencing on June 15, 2015, and continuing until such time as the completion of the sale of the matrimonial home, the Husband shall pay to the Wife spousal support in the amount of \$324.00 per month on the 15th day of each and every month thereafter until such time as either varied by the parties or varied by a court of competent jurisdiction.
10. Either party may apply to a court of competent jurisdiction for a variation of spousal support upon a change in the conditions, means, needs or other circumstances of either of them since entering into this partial Agreement.

[8] In his affidavit filed in support of his motion Mr. Arenburg stated:

It was also only subsequent to the Partial Separation Agreement and the filing of said the draft Corollary Relief Order and Divorce Order that I was approached by Cody Weagle, who had in or about the spring of 2013 constructed the deck on the rear of the former matrimonial home, and was informed by him and do verily believe that while he was working on the construction of said deck, the Petitioner told him on several occasions that she worked as the manager of the Quarterdeck not for her salary but for her tips and that the “real money” is in the tips.

There was no affidavit or any evidence from Cody Weagle before me.

[9] As a result of a dispute concerning the date of cohabitation and the issue as to whether Ms. Arenburg received tips while employed as restaurant manager, a further discovery of Ms. Arenburg was held on January 20, 2016 to deal with the issue of whether Ms. Arenburg disclosed all her income and the date of cohabitation of Mr. and Ms. Arenburg.

[10] During the course of the discovery Ms. Arenburg's counsel advised Ms. Arenburg not to answer a question and the discovery ended. Mr. Arenburg then brought the motion before the court.

[11] The meaning of "relevant" in the context of disclosure and discovery is defined in Civil Procedure Rule 14.01 as follows:

14.01 (1) In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:

(a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;

(b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.

(2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.

[12] The issue of spousal support was settled by the partial separation agreement of July 20, 2015. Documents concerning Ms. Arenburg's income were undertaken to be produced by her during the discovery of May 20, 2015. Then subsequently the parties entered the partial separation agreement of July 20, 2015, which includes the following provision:

D) The parties have obtained sufficient advice and information as to the estate and prospects of the other party and they have been informed by their respective solicitors of their respective rights and liabilities against and to each other and to and with reference to the property and the estate of the other, and more particularly have been advised by their respective solicitors as to the rights and obligations pursuant to the *Matrimonial Property Act of Nova Scotia* and agree that this partial Agreement is in full substitution for any rights and obligations accruing to them pursuant to the said Act.

[13] The issue of spousal support having been settled documentation concerning spousal support is not relevant to any issue the court must decide.

[14] Also questions concerning spousal support are not relevant to any issue which has not been settled and therefore Ms. Arenburg will not be ordered to answer such questions.

[15] In order for spousal support to be a relevant issue the partial separation agreement of July 20, 2015 would have to be varied or set aside.

[16] The motion is dismissed.

[17] I will hear the parties as to costs.

Coughlan, J.