SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Mullen v. Mullen, 2011 NSSC 326

Date: 20110826
Docket: SFHMPA-076391
Registry: Halifax

Between:

Ramona Lynn Mullen

Applicant

v.

Tyler Lee Mullen and Peter Nathanson

Respondents

Judge:	The Honourable Justice Elizabeth Jollimore
Date:	August 26, 2011
Counsel:	Paul B. Miller on behalf of Ramona Mullen Peter D. Crowther on behalf of Tyler Mullen Philip S. Gruchy on behalf of Peter Nathanson

Introduction

[1] Ramona and Tyler Mullen separated in February 2011. In the months since their separation, they have taken some steps to deal with their separation. These steps include selling the matrimonial home. Other issues remain unresolved, including Ms. Mullen's claim pursuant to sections 13 and 18 of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 relating to a mink farm, Sissiboo Farms. As events have transpired she brought an application against her husband, Tyler Mullen, and an application against a lawyer, Peter Nathanson.

[2] Shortly before the hearing, Mr. Mullen retained Peter Crowther to represent him and the application involving him was resolved by consent. This decision relates to the application involving Mr. Nathanson.

Application history

[3] Ms. Mullen filed her application on July 13. She sought a declaration that Mr. Nathanson was in a conflict of interest and an order that he be enjoined from further acting for either her or her husband in any matter relating to the sale of the land used for the mink farming business or "any other matter related to family proceedings between the parties".

[4] The matter was determined to be urgent and the application was scheduled for July 20, 2011. Mr. Nathanson was personally served with documents relating to the application, including Ms. Mullen's affidavit, on July 18. On that same day, Ms. Mullen's counsel, Paul Miller, filed a brief in support of the application relating to Mr. Nathanson.

[5] In response to being served, Mr. Nathanson wrote a lengthy letter to the court on July 18. In it, he outlined factual matters and provided an opinion about the claim against him. Mr. Nathanson said "As I am not familiar with the practice of the Court on such a matter, I would request some direction from the Court as to whether I, personally, should attend Court or whether this letter will suffice."

[6] As soon as this letter was provided to me, I wrote a response to Mr. Nathanson, Mr. Mullen (who hadn't yet retained counsel) and Ms. Mullen's counsel, letting Mr. Nathanson know:

> The matter is set for a hearing. It appears from Mr. Nathanson's correspondence that he has received a copy of the materials filed by Ms. Mullen. Of course, if he does not wish to appear, he need not do so. Counsel may appear on his behalf, if Mr. Nathanson wishes. I can act in Mr. Nathanson's absence where he has received notice. **I do note that the information in his correspondence is not evidence and I cannot consider it in determining Ms. Mullen's application**. [emphasis added]

[7] There was no further communication from Mr. Nathanson until the hearing began on July 20. As counsel for Ms. Mullen and Ms. Mullen entered the courtroom, I was given a fax from Mr. Nathason. This fax informed me that the sale of land used for the mink farm (which is registered in Mr. Mullen's name) would be handled by Peter Crowther. This letter repeated Mr. Nathanson's assertion that he was not in a conflict of interest and it relayed the opinion of other unnamed individual or individuals with whom he consulted on this point. Mr. Nathason copied this correspondence to Mr. Crowther and to Mr. Miller. While this letter was faxed to the court, it was sent to opposing counsel by email. Neither had seen it prior to coming to court.

[8] In the fax, Mr. Nathanson did not address Ms. Mullen's application that he not represent her or her husband in any matter relating to the family proceeding between them. Mr. Nathanson did not request an adjournment. Mr. Nathanson did not state that he had retained counsel. The fax was not copied to anyone other than Mr. Crowther and Mr. Miller.

[9] When the hearing began, Mr. Miller informed me that he had been in contact with two lawyers. He said it was unclear who might be retained by Mr. Nathanson and that, in any event, neither clearly confirmed whether Mr. Nathanson would or would not undertake not to represent Mr. Mullen with regard to the family law dispute. As a result, Mr. Miller felt compelled to pursue this aspect of the application.

[10] I heard from Mr. Miller and Mr. Crowther regarding the application between Ms. Mullen and Ms. Mullen and how they proposed to address it. I then heard submissions from Mr. Miller on behalf of Ms. Mullen in her application relating to Mr. Nathanson. Following Mr. Miller's submissions, I gave an oral decision.

[11] I determined that Mr. Nathanson was in a conflict of interest. Acknowledging that Mr. Mullen had now retained alternate counsel in the sale of the mink farm, I enjoined Mr. Nathanson from acting for either of the spouses in their family dispute. I also granted Ms. Mullen's claim for costs. Ms. Mullen had sought costs of $750.00 and complete indemnification for the service costs which were $646.88. On the basis that this was an application of less than one hour which required research and preparation of a pre-hearing brief, I awarded her costs of $500.00 and I ordered that Mr. Nathanson contribute an additional amount of $325.00 toward the costs Ms. Mullen had incurred in personally serving Mr. Nathanson and Mr. Mullen.

[12] Following the hearing on July 20, Philip Gruchy faxed a letter to me. In it, he said he was Mr. Nathanson's counsel. Mr. Gruchy said that he was retained by Mr. Nathanson to appear at the hearing. Mr. Gruchy said that he sent an email to this effect to Mr. Miller. Mr. Gruchy outlined communications between himself and Mr. Crowther regarding the application between the spouses. Mr. Gruchy said that "In light of the earlier correspondence from Mr. Miller I was satisfied that the issue of Mr. Nathanson's alleged conflict of interest was at an end and there would be no need to appear today." Mr. Gruchy said he did not see my letter to Mr. Nathanson until after the court appearance and, if he had seen it, he would have taken steps to advise the court that the matter was, he assumed, resolved. Mr. Gruchy wrote that "I am concerned that my casual approach to this matter has led to an unfortunate consequence for Mr. Nathanson" and he asked for the opportunity to "speak to this matter before any order from the hearing" was issued.

[13] I considered then-Justice Glube's decision in *Crédit foncier franco-canadien v. Fort Massey Realties Ltd.* (1981), 49 N.S.R. (2d) 646 (T.D.). On July 26, I wrote to all counsel and said I was "prepared to receive **written submissions from Mr. Gruchy**." [emphasis added]

[14] Before I continue, I note that Mr. Miller has provided me with a copy of the email exchange between himself and Mr. Gruchy. I understand this is the "earlier correspondence" on which Mr. Gruchy based his assumption that the application against his client was resolved. Mr. Gruchy sent an email to Mr. Miller which said, in full: "I write to advise you that I will be appearing for Mr. Nathanson in Chambers tomorrow at 10:30 am. I will be out of town for most of the day today. If you need to reach me it is best to send me an email."

[15] Mr. Miller did send Mr. Gruchy an email. It is somewhat lengthy, but I reproduce it in full below:

> Mr. Gruchy,
>
> I am confused.
>
> Peter Crowther called me earlier today and advised that your client, Peter Nathanson, had withdrawn from acting in any way for Tyler Mullen, including in the completion of the migration and sale of the disputed 60 acre parcel of land, and that his firm was now retained by Tyler Mullen to represent him in both the property and family matter.
>
> If this is the case there is no need to proceed with our application to have Mr. Nathanson removed as solicitor.
>
> Unfortunately, Mr. Nathanson has not communicated this to me, nor has Bill Watts who Mr. Nathanson has indicated is now his counsel.
>
> Furthermore, I have a copy of Mr. Nathanson's letter to the Court sent yesterday, and Justice Jollimore's response, which suggests he is still acting for Mr. Mullen.
>
> Please clarify your understanding to both myself and to Mr. Crowther.
>
> It probably would not hurt to let the Court know as well if Mr. Nathanson has indeed withdrawn.
>
> Yours truly,
>
> Paul B. Miller

[16] I fail to see how Mr. Gruchy could interpret Mr. Miller's email so as to satisfying himself that " the issue of Mr. Nathanson's alleged conflict of interest was at an end and there would be no need to appear". Mr. Gruchy told Mr. Miller that he would be appearing on behalf of Mr. Nathanson. Mr. Miller asked Mr. Gruchy to confirm certain information which, *if confirmed by Mr. Gruchy,* would mean it wasn't necessary for Ms. Mullen to pursue her application. Mr. Gruchy never provided that confirmation. He did not respond at all to Mr. Miller's email. As a result, Mr. Miller appeared and argued Ms. Mullen's application.

[17] As noted, I advised all that I would allow Mr. Gruchy to make written submissions and I set a date when they were due. Mr. Gruchy provided a brief to me.

[18] Additionally, on the date Mr. Gruchy filed his brief, Mr. Nathanson faxed a letter to the court. His letter said:

> My Lady:
>
> I have been named as a Respondent in the above noted matter.
>
> My counsel, Philip Gruchy, has arranged for a brief to be filed.
>
> Although unorthodox, I enclose herewith my own affidavit. I regret that the obvious wisdom of filing an affidavit only became apparent to me after Mr. Gruchy has prepared a brief and while Mr. Gruchy was on a well deserved family vacation.
>
> I appreciate the opportunity that the Court has provided me to address the Court.
>
> Yours respectfully,

[19] The letter is copied to Mr. Crowther and Mr. Miller. It appears that Mr. Nathanson has not provided a copy of the letter or enclosed affidavit to his own counsel, Mr. Gruchy. The letter's content suggests that because Mr. Gruchy is on a family vacation, he is unaware that Mr. Nathanson is filing an affidavit.

[20] The accompanying affidavit is ninety-nine paragraphs long and appends six exhibits. The entire document is twenty-three pages long.

[21] I gave permission to Mr. Gruchy to file submissions. I did not give permission to Mr. Gruchy to file an affidavit on behalf of Mr. Nathanson. I did not give permission to Mr. Nathanson to "address the Court". The evidentiary basis for the application is contained in Ms. Mullen's affidavit. In my July 19 letter to Mr. Nathanson I was explicit that his letter was not evidence and would not be considered in dealing with Ms. Mullen's application.

[22] Filing an affidavit at this point denies Ms. Mullen any opportunity to object to its contents or to cross-examine Mr. Nathanson. According to the then-Appeal Division in

Magionas SCA No 01866 (February 8, 1988), "Counsel must always have the right to test affidavit evidence". In *Magionas*, the trial judge's refusal to permit cross-examination resulted in setting aside the trial judgment and remitting the matter for re-hearing.

[23] Mr. Gruchy represents Mr. Nathanson. Mr. Gruchy speaks on Mr. Nathanson's behalf. Mr. Nathanson is a lawyer. In this situation, he is a respondent in a lawsuit and, where he has chosen to be represented by counsel, Mr. Nathanson has no right to make submissions in addition to those of counsel. If Mr. Nathanson wanted to act as an advocate, the appropriate course would be to discharge Mr. Gruchy, to file a Notice of Intention to Act on One's Own and to make submissions. Mr. Nathanson cannot have counsel and be counsel simultaneously: he must be one or the other.

[24] While I have counted the paragraphs, pages and exhibits in Mr. Nathanson's affidavit, I have not read it.

[25] I note Mr. Miller's concern that, in filing this affidavit, Mr. Nathanson has taken the opportunity to breach privilege by disclosing confidential information provided to him by Ms. Mullen.

[26] My approach to Ms. Mullen's application in these circumstances is this: Mr. Gruchy was, to use his word, "casual" in his representation of Mr. Nathanson with regard to the July 20 application. As a result of this, Ms. Mullen pursued her application for a declaration that Mr. Nathanson was in a conflict of interest and for an order enjoining him from representing her husband in their family law proceeding. Mr. Nathanson was advised that his letter to the court was not evidence and would not be considered in determining Ms. Mullen's application. He was advised I could proceed in his absence. Regardless of this, no steps were taken to place any evidence before me on his behalf so that I might consider it at the hearing. There was no request an adjournment on Mr. Nathanson's behalf.

[27] The record upon which I will make my decision is the evidentiary record I had before me on July 20. Mr. Gruchy argues that since Ms. Mullen filed an affidavit, Mr. Nathanson should have the opportunity to do so, as well. Mr. Gruchy did not request a re-hearing where Mr. Nathanson would be able to offer evidence and, if that had been requested, the request would have been denied.

[28] Mr. Gruchy sought, and was given permission, to file submissions. I consider these as I revisit Ms. Mullen's application. If Mr. Gruchy had appeared on July 20, he would have been able to make submissions. What Mr. Nathanson has lost by virtue of the failure to appear on July 20 is the opportunity to cross-examine Ms. Mullen and to adduce evidence of his own.

Conflict of interest

[29] Ms. Mullen's concern is that Mr. Nathanson has both represented her and acted against her interest. She has offered sworn evidence that he represented her in the sale of the matrimonial home and that he, thereafter, gave her husband advice about setting aside this transaction. I accepted that this was a conflict of interest.

[30] In his submissions, Mr. Gruchy admits that Mr. Nathanson acted for both spouses in the sale of their matrimonial home. He identifies two issues with regard to the allegation that Mr. Nathanson was in a conflict of interest. Neither of these issues related to the advice given to Mr. Mullen about setting aside the sale of the home. Mr. Gruchy made no legal argument with regard to the conflict Ms. Mullen identified. There is no reason to modify my decision in this regard.

Enjoining future representation

[31] Ms. Mullen applied for an order enjoining Mr. Nathason from representing either party in the future, in relation to the sale of the property on which the mink farm operates or in relation to their divorce. In the letter I received from Mr. Nathanson when court began on July 20, Mr. Nathanson said he'd withdrawn from representing Mr. Mullen in the land sale. In his letter, Mr. Nathanson did not offer any comfort that he would not resume this retainer in the future or that he would not act for Mr. Mullen in the divorce. As a result, I granted Ms. Mullen's request that Mr. Nathanson be enjoined from representing Mr. Mullen in the couple's divorce.

[32] Mr. Gruchy has made no submissions with regard to these issues. He noted that Mr. Nathanson confirmed he was no longer representing Mr. Mullen in the sale of the land used for the mink farm. He did not address whether Mr. Nathanson might resume this retainer nor did he address the parties' upcoming divorce. Mr. Gruchy's submissions don't provide me with any basis on which to deviate from my original decision.

Costs

[33] When the application was initially heard, I awarded Ms. Mullen costs of $500.00 and a contribution of $350.00 toward her disbursements. Since that decision was made, Ms. Mullen has been compelled to incur further legal expense. Mr. Miller has been required to review and analyse Mr. Gruchy's submissions and the lengthy affidavit Mr. Nathanson filed. Mr. Miller has corresponded to me about Mr. Nathanson's affidavit and he has had to consider a letter from Bill Watts, who says he does not represent Mr. Nathanson, but who writes to me on Mr. Nathanson's behalf.

[34] In light of the additional work required of Mr. Miller, I do modify my costs award: Mr. Nathanson shall pay Ms. Mullen costs of $1,000.00 and contribute $350.00 to her disbursements. Mr. Miller will prepare the order.

_____

Elizabeth Jollimore, J.S.C.(F.D.)

Halifax, Nova Scotia