<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: *Moore v. Moore*, 2011 NSSC 376

Date: 20111014
Docket: Ken No 348513
Registry: Kentville

Between:

Donal O'Brien Moore

Applicant

v.

Wendy Moore

Respondent

<u>Costs Decision</u>

Judge: The Honourable Justice Gregory M. Warner

Heard: August 31, 2011 (by recorded conference call)

Final Written Submissions: September 23rd, 2011

Written Decision: October 14, 2011

Counsel: **Scott W. Lytle**, counsel for the applicant *Donal Moore*
B. Lynn Reierson QC, counsel for the respondent *Wendy Moore*

By the Court:

[1] Donal and Wendy Moore were married in 1992 and separated in 2005. They had been residing in Germany for three years before their separation. They have two young children.

[2] In 1995, Wendy Moore acquired in her name alone a residence in Nova Scotia. Upon their separation, Donal Moore commenced legal proceedings in Germany respecting a divorce, parenting of their children, child and spousal support, as well as division of property.

[3] On May 12, 2011, Donal Moore filed a Notice of Application in Court pursuant to the *Matrimonial Property Act of Nova Scotia* (*"MPA"*) seeking several forms of relief, including a declaration, pursuant to s. 10, that the residence in Nova Scotia was a matrimonial home, a declaration that he had an interest in the residence, and a division of that property pursuant to ss. 12 and 13.

[4] During the hearing of the Motion for Directions on May 24, 2011, counsel for Ms. Moore gave notice that she intended to file a Notice of Contest challenging the jurisdiction of the Supreme Court of Nova Scotia to hear the application on two basis:

i) The Nova Scotia property had been dealt with as part of the divorce proceedings commenced by Mr. Moore in Germany and all appeals had been finalized. The value of the Nova Scotia residence was valued and its value divided between the parties in the German divorce proceedings. The matter was *res judicata*.

ii) Because the parties were divorced, effective April 11, 2011, a month before the Nova Scotia application was filed, the Applicant had no standing to apply for relief under the *Matrimonial Property Act* as he was not a spouse when the application was commenced.

[5] Counsel for the parties agreed that the Court would hear Ms. Moore's contest as to its jurisdiction first, and, depending upon the result of that contest, would schedule a hearing to determine the claims for relief sought by Mr. Moore. The hearing of the jurisdictional issue was set for August 31, 2011.

[6] On June 30th, counsel for Ms. Moore filed a Notice of Contest setting out the challenge to this Court's jurisdiction, affidavits of Wendy Moore and of her German attorney, Florian Liebl, and a brief. Mr. Moore failed to file any affidavits or a brief in response.

[7] On August 29th, counsel for Mr. Moore filed a Notice of Discontinuance of his application.

[8] On August 30th, Ms. Reierson asked that the Applicant's request for discontinuance be granted only upon the condition that the discontinuance would bar any further action respecting the same issue, or alternatively, that the Court dismiss the application.

[9] Mr. Lytle replied that Mr. Moore did not agree to the discontinuance being subject to the condition proposed by Ms. Reierson. He further submitted that CPR 9.02(1) does not require leave of the Court to file a discontinuance of an application before the day of the hearing.

[10] By recorded telephone conference held on August 31st, 2011, counsel made further oral submissions. The Court interpreted *CPR 9.02* as precluding a plaintiff in an action from discontinuing the action after the trial readiness conference without permission of the judge, but the applicant in an application may discontinue the proceeding at any time before the day of the hearing without the permission of the judge. For that reason, the Court was without authority to impose a condition on filing of a discontinuance of an application before the date of the hearing.

[11] In his written submission of August 30th, repeated orally on August 31st, Mr. Lytle acknowledged that the respondent was entitled to costs from the applicant. The parties did not agree on the quantum of costs. Both have made further written submissions.

The Parties' Submissions

[12] Ms. Moore seeks solicitor-client costs for the services of Ms. Reierson in the amount of $5,511.56 together with the fees of her German attorney for reviewing the affidavit of Ms. Moore with respect to the attachment and translations of the German Court Orders and his own affidavit in the amount of 473.62 Euro.

[13] Ms. Reierson submits that the Nova Scotia application was completely without merit and that the applicant knew so. The applicant was trying to get compensated for the value of the Nova Scotia property twice.

[14] Ms. Reierson noted that the parties had agreed in their German divorce proceedings - proceedings commenced by Mr. Moore, to deal with his interest in the Nova Scotia residence. The Affidavits filed by Ms. Moore and her German attorney are the only factual evidence before the Court as to those proceedings.

[15] It is clear that the Nova Scotia residence was part of the German divorce proceedings. The parties could not agree upon the value of the Nova Scotia residence; three appraisals were obtained. In the property division decision of the German trial judge, given on July 28, 2010, it is clear that the Court fixed the value of the Nova Scotia residence, for the purposes of the property division between the parties, at 1,135,245.50 Euro. Ms. Moore was ordered to make an equalization payment to Mr. Moore based on the assets that each party retained (including the fact that Ms. Moore retained the Nova Scotia residence).

[16] Ms. Moore appealed the trial judge's decision. The German Appellate Court upheld the trial judge's determination of the value of the Nova Scotia property and the equalization payment from Ms. Moore to Mr. Moore.

[17] According to the affidavit of the German attorney, Florian Liebl, the parties were divorced effective April 14, 2011.

[18] Ms. Reierson, on behalf of Ms. Moore, refers the Court to *Young v Young*, [1993] 4 SCR 3 at para 64 and *Petten v EYE Marine Consultants*, 1998 CarswellNfld 351 at para 87, which was applied in *Chisholm v Nova Scotia,* 2009 NSSC 29.

[19] Ms. Reierson acknowledges that a meritless application, by itself, does not merit an award of solicitor-client costs. She acknowledges that solicitor-client costs awards are punitive in nature, awarded to rebuke reprehensible, scandalous and outrageous conduct and, even then, only then in rare and exceptional cases. Citing *Petten*, she submits that they can and should be awarded when the applicant deliberately makes a frivolous or vexatious application.

[20] On the facts of this case, Mr. Moore, who started the German divorce proceeding knew that his interest in and the value of the Nova Scotia residence was determined in the German proceedings. He was, in effect, attempting to receive twice the benefit of his interest in the Nova Scotia residence. Ms. Reierson further notes that immediately upon the filing of the Application, she wrote to Mr. Lytle advising that the claim had been dealt with by the German courts, and giving notice that if this application proceeded, and she was successful, she would seek solicitor-client costs.

[21] Ms. Reierson notes that the Notice of Discontinuance was filed on August 29th, on the eve of the hearing date, long after Mr. Moore had received the respondent's affidavits and brief, and long after the deadline for Mr. Moore to file the applicant's affidavits and brief.

[22] On behalf of Mr. Moore, Mr. Lytle submits that costs are governed by *CPR 9.06*, *CPR 77.01* and *77.02* as well as "by Tariff C of the *Fees and Allowances under Part I and II of the Act, NS Reg 91/2009*."

[23] He submits that a relevant consideration in the award of costs is that the discontinuance was filed before the hearing of the preliminary motion and not after what could have been a lengthy hearing on the merits of the applicant's claims. He denies that the application was vexatious.

[24] Mr. Lytle submits that because the Nova Scotia property is immoveable property, Nova Scotia has jurisdiction to deal with the ownership and division in accordance with s. 22 of the *MPA*. In this regard, he cites two decisions in the same divorce proceeding, *Vladi v Vladi*, [1986] NSJ 102 and [1987] NSJ 204.

[25] He submits that in this application, the applicant sought an *in rem* remedy, whereas the German divorce proceeding involving an equalization payment - an *in personum* claim only. He submits that there is no basis for the assertion in the respondent's brief that Mr. Moore knew that his claim was unfounded or that he acted maliciously or recklessly.

Analysis

[26] The Court was confused by Mr. Lytle's reference to "Tariff C of the *Fees and Allowances under Part I and II of the Act, N.S. Reg. 91/2009*". It appears that the Tariff C cited by Mr. Lytle (copied in full on pp. 9 to 12 of his brief), is the Tariff contained in a regulation promulgated pursuant to sub-section 2(1) of the *Costs and Fees Act*.

[27] That regulation sets out the fees to be charged by some government departments, government registries and various courts for services. In addition, in an unnumbered subsection, under what I call s. 2 "Supreme Court and Court of Appeal", there is a subsection called "Solicitor's Fees". The first sentence under that subtitle reads: "These fees are subject to such amendments as made from time to time be made by the judges of the Supreme Court under the authority of the *Judicature Act*."

[28] In fact, new *Civil Procedure Rules* did come into effect on January 1, 2009. These Rules do contain a new schedule of tariffs for awarding costs. They are set out in the *Rules* at the end of CPR 77.

[29] *Civil Procedure Rule 77.06* reads as follows:

> (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

[30] Six tariffs are set out at the end of *CPR 77* under the heading: "Tariffs of Costs and Fees Determined by the Costs and Fees Committee to be used in Determining Party and Party Costs". The tariff relevant to this proceeding is Tariff F.

[31] The heading for Tariff F reads: "Tariff of fees allowed for Solicitor's Services Allowable to a Party Entitled to Costs in a Proceeding which is Discontinue or Settled"

[32] The relevant portion of Tariff F reads: "When determining costs in a proceeding, which is settled or discontinued, a taxing officer may assess the amount involved and the costs based on the following . . . Where the proceeding is discontinued or settled and the amount involved exceeds $100,000.00, costs shall not be more be more than the total of $5,000.00 plus 2% of the amount in access of $100,000.00."

[33] This tariff requires the Court to first make an assessment of the "amount involved" and then, exercising discretion judicially, to award costs in an amount not exceeding the maximum calculated by applying the "amount involved" to the tariff.

[34] Neither party addressed Tariff F. The Court notes that the reference made by Mr. Lytle to Tariff C in the regulation cited by him contains a similar formula to Tariff F in CPR 77.

[35] My first task is to determine the "amount involved". The affidavits of Ms. Moore and Mr. Liebl are the only factual evidence before the court. Mr. Moore discontinued the Application, after Ms. Moore's affidavits were filed but before he filed any affidavits.

[36] The Affidavits of Ms. Moore and Mr. Liebel describe the German divorce proceedings and attach as exhibits copies of four decisions in those proceedings, including the eighteen page property division decision of July 28, 2010. It appears from the latter decision that the value of the Nova Scotia residence was fixed at 1,135,245.50 Euro. As noted previously, the value of the Nova Scotia residence was added to the column of assets retained by Ms. Moore and, in respect of which, she was ordered to make a balancing payment to Mr. Moore. Ms. Moore apparently unsuccessful appealed this decision.

[37] I do not have the benefit of the particulars of the property division regime applied by the German Court and therefore do not know if it is consistent with ss. 12 and 13 of the *MPA*. By s. 12 of the *MPA*, spouses are presumptively entitled to an equal division of matrimonial property. Pursuant to s. 13, either may apply for an unequal division if an equal division would be unfair or unconscionable.

[38] Mr. Moore's application sought a declaration that the residence was matrimonial home, and sought a division in accordance with both ss. 12 and 13 of the *MPA*.

[39] For the purposes of this exercise, I find that the "amount involved" in this proceeding was 50% of the value placed on the Nova Scotia residence in the July 28, 2010 decision; that is, 567,622 Euros. At today's exchange rate, 1Euro equals 1.401 Canadian dollars. At the exchange rate on July 28, 2010, 1 Euro equaled 1.347 Canadian dollars. Based on today's conversion rate, the amount involved is about $796,000. Based on the July 28, 2010 exchange rate, it was about $765,000.

[40] Applying the July, 2010, exchange rate, the "amount involved" is Cdn $765,000. Applying this amount to the formula in Tariff F, the maximum costs award under Tariff F would be $18,300. (Applying the formula in the Tariff C cited in Mr. Lytle's brief, the maximum would be $9,600.)

[41] The second determination is where, between zero and $18,300, on the facts of this case, costs should be awarded.

[42] An important factor is that the actual costs to the Respondent to defend this application were $6,175.10. I obtain this figure by adding to Ms. Reierson's bill the account of the German lawyer who, appropriately in my view, reviewed Ms. Moore's affidavit and prepared his own. I have converted his account of 473.62 Euro to Canadian dollars at the current 1.405 Canadian dollars to one Euro exchange rate.

[43] The real issue is whether the costs award should be more, based on the other relevant circumstances.

[44] Mr. Moore has provided no explanation why the application was discontinued on the eve of the August 31st hearing. Neither an affidavit nor a brief were filed with respect to the jurisdictional issues.

[45] The Court is left to speculate about the motives of Mr. Moore in bringing the Nova Scotia application, and in discontinuing it after the respondent had spent over $6,000.00 preparing for the hearing.

[46] This speculation is compounded by the fact that Mr. Lytle, on behalf of Mr. Moore, did not agree that the discontinuance would be conditional upon an application claiming the same relief or in respect of the same subject matter would not be recommenced at another time.

[47] Also relevant is the fact that Ms. Moore cannot close her file and move on with this issue behind her. She can anticipate that at some time in the future Mr. Moore may recommence this or a similar application.

[48] Because the applicant never filed affidavits or a brief in support of his application nor responded to the respondent's jurisdictional argument, and because the applicant has not disclosed the reason for the discontinuance, and because the applicant is not prepared to undertake not to recommence this or a similar application, and because the discontinuance was filed on the eve of the hearing of the jurisdictional challenge, I would normally be inclined to award costs at the higher end of the range provided in Tariff F.

[49] At the end of the day, it would be inappropriate to award costs in an amount greater than the amount sought by the respondent, or her actual costs. I order that the applicant pay forthwith to the respondent, her costs of the Application in the amount of $6,175.10.

J.