SUPREME COURT OF NOVA SCOTIA
Citation: Armoyan v. Armoyan, 2011 NSSC 242

Date: 20110617
Docket: 1201-65036
Registry: Halifax

Between:

Vrege Sami Armoyan

Petitioner

v.

Lisa Armoyan

Respondent

Judge: The Honourable Justice Douglas C. Campbell

Heard: May 31, 2011, in Halifax, Nova Scotia

Counsel: Gordon Kelly, for the petitioner
Mary Jane McGinty, for the respondent

By the Court:

[1] This proceeding raises preliminary issues in regard to a divorce trial between the parties. The male spouse is the petitioner (hereinafter referred to as "the husband") and the female spouse is the respondent (hereinafter referred to as "the wife"). The parties have three children.

[2] The wife resides in Boca Raton, Florida and the husband, a local businessman and investor, currently lives in Halifax, Nova Scotia.

[3] There are proceedings between the parties in relation to the breakdown of their marriage currently before both a trial court and an appeal court in Florida. An issue which arose both before the Florida trial court and this court is whether certain documents stored on a computer are admissable in evidence which would ordinarily be protected by solicitor/client privilege.

[4] The wife came into possession of a computer on which a number of documents were found, accessed in circumstances that will be referred to below. These documents include communications between the husband and his legal counsel in Florida and as such he claims them to be privileged and therefore not admissible in this court. The same documents were the subject of an admissibility argument before the Florida trial court. That allowed that the documents to be admitted in evidence in Florida because the privilege was found to have been waived by the fact that the husband allowed the wife access to the subject computer or because the facts of the case trigger an exception to the rule of privilege because of inappropriate and fraudulent conduct by the husband in respect of those documents. That decision is under appeal in Florida and the appeal court's ruling is not yet available.

[5] The wife takes the position that the doctrine of *res judicata* applies to the Florida trial decision with the impact that I am obliged to admit the subject documents in the proceeding before this court. In her oral argument, counsel for the wife argued that the matter in Florida is sufficiently final for the doctrine to apply. However, she prefers an adjournment of her own motion regarding admissibility until the Florida appeal decision is rendered such that there then can be no doubt that there is finality with regard to the issue in Florida.

[6] It is important to note that this court has not yet ruled on the question of whether it will accept jurisdiction to hear the matters brought before it or, instead, whether it will defer matters to the Florida courts. The proceedings here are pursuant to the *Maintenance and Custody Act,* R.S.N.S. 1989,c. 160 in relation to the registration of a certain marriage contract between the parties and custody of the parties' son. The wife contests the husband's application on the basis that Nova Scotia is not the convenient forum.

[7] There is another proceeding here pursuant to the *Divorce Act*, R.S. 1985, c.3 (2nd Supp.) seeking custody, a detail of access and costs, also brought by the husband. In this action an order will be sought that the marriage contract between the parties determines their respective rights and obligations pursuant to the *Matrimonial Property Act*, R.S.N.S., 1989, c. 275. The wife will contest the validity of the marriage contract.

[8] There had been other litigation in Nova Scotia involving the parties including an application by a company in which the husband had been a shareholder and director. That issue was heard by Justice Moir who determined that Florida was the appropriate forum to hear that matter.

[9] At various conferences between counsel and the court, it was determined that a decision should first be made as to whether the doctrine of *res judicata* dictates the admissibility of the subject documents, whether the motion to that affect should be adjourned pending the appeal in Florida and whether, even if that doctrine does not apply the documents are admissible in any event. After that determination is made, there will be fresh submissions on questions of *forum non conveniens* and if it is determined that Nova Scotia is the appropriate forum, whether the marriage contract is valid. There may be an additional argument with regard to jurisdiction that needs no elaboration here.

[10] The parties agreed that I could have access to the subject documents and that the evidence in Florida, of which there is a transcript, would be used in this proceeding.

[11] The subject computer was owned by the above mentioned company in which the husband was a shareholder and director at the time. There was some dispute in the evidence as to the family's access to the computer, it being the

contention of the husband that it was primarily a business computer and that any business or personal documents contained on the hard drive were confidential. He indicated that any access to the computer by family members including the wife was limited and password protected.

[12] Counsel for the husband reminded the court that the wife had taken the computer without the husband's permission on a previous occasion and when they reconciled their differences she made a promise not to do that again.

[13] At some point after the parties separated for what appears to be the final time, and in approximately October of 2009, the wife took the computer from the house where the parties were staying in Florida and had the contents of the computer "cloned". Counsel submits that the difference between copying and cloning is that the former leaves traces of the fact of the copy having been made and the latter leaves no trace.

[14] A considerable period of time lapsed between the date when the copies were made and the date when the husband was informed that the wife had such documents in her possession. The wife's Florida counsel contended in court there that the subject documents will show that the husband is a very wealthy man and has hidden assets if he does not disclose them in Florida. Counsel for the husband here points to transcripts which contend that the court had stayed the need for financial discovery until after the question of jurisdiction as between Florida and Nova Scotia was determined.

[15] In November 2010, in response to the husband's attempt to disqualify those persons representing the wife who had viewed the subject documents, the respondent argued that the husband waived privilege by failing to comply with a discovery rule in Florida dealing with the procedure for claiming privilege, by disclosing documents to third parties and by perpetrating fraud on the wife by misrepresenting the nature of the marriage contract and on the court by falsifying testimony and documents. At the hearing of that motion, the husband's counsel requested that the court hear evidence in relation to the issues mentioned above to satisfy itself that there was no wrongdoing on the husband's part. The court did not hear evidence as requested.

[16] On December 15, 2010 the Florida trial judge denied the motions to disqualify the advisors, found waiver of privilege according to Florida statute and permitted the use of the subject documents in evidence.

[17] At page 21 of his brief, counsel for the husband contends that the matter should not be adjourned or a decision reserved pending the outcome of the appeal in Florida of the decision which allowed the documents to be admitted. He contends that I must determine whether *res judicata* applies and that if the answer is in the affirmative, the proceeding would be adjourned to the next stage. If the answer is in the negative, this court should make a fresh determination of whether the documents are admissible and that that decision would be made at the jurisdictional hearings, then set for later this month, but now adjourned to future dates.

Res judicata

[18] In the case of *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 summarized by Justice Warner of this court in *Ashby v. MacDougall Estate*, 2005 NSSC 148 he states:

> (15) The law is set out by the Supreme Court of Canada in Danyluk v. Ainsworth Technologies Inc. 2001 2 SCR 460 (S.C.C.) Binnie, J. at paragraph 33 writes that the analysis consists of two steps. The first step is to determine whether the applicant has established the three pre-conditions to the operation of issue estoppel. The second step is a determination of whether, as a matter of discretion, issue estoppel ought to be granted. The three pre-conditions are ;
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> (1) Whether the same question was decided in the prior proceeding;
>
> (2) Whether the judicial decision that creates the estoppel was final;
>
> (3) Whether the parties in both proceedings were the same.
>
> (16) In the second step, the factors for or against the exercise of the discretion must be addressed. It is an error of principal not to address them. In Danyluk the question arose from a prior administrative decision dealing with the same issue between the same parties. The court concluded that the pre-conditions were met in that case and it then addressed as part of the discretionary analysis, seven factors that were specifically relevant when an administrative body made the prior decision.

[19] It is not argued here that this court does not face the same question between the same parties as was the case in Florida. Both counsel filed briefs on the question of whether or not the existence of the appeal of the subject decision means it is not sufficiently final to meet the second requirement for *res judicata* above mentioned. The main motivation for the wife's counsel to seek an adjournment of her motion until the appeal is dealt with in Florida is to ensure that there will be no question that the requirement for finality has been met. She has provided some authority standing for the proposition that an appeal does not negate finality of the trial decision. I will deal with that issue further below.

[20] Counsel for the wife submitted authorities to support her contention that there is no discretion available to the court; if the above three requirements for *res judicata* have been met then this court must apply the decision, she argues.

[21] In *General Motors of Canada Ltd. V. Naken* [1983] 1 S.C.R. 72, Estey, J. acknowledged that there is room for discretion but noted at page 101 that in the context of court proceedings "such a discretion must be very limited in application. In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of structures, mandates and procedures of administrative decision makers."

[22] The above quotation makes it clear that such a discretion exists. Although the three factors, above noted must be present in order for *res judicata* to apply it does not follow, in my view, that the application of the doctrine is then automatic.

[23] It occurs to me that the propensity to apply the doctrine of *res judicata* may be different as the nature of the decision being considered varies. For example, the application of the doctrine in respect to the decision from a tribunal may be less likely than in respect of a decision from a competent court. Often, the decision being asked to be recognized is a decision on the merits of the case. Here, the decision is one in respect of a ruling within a trial process with respect to the admissibility of the subject documents. The application of the doctrine dealing with a decision from certain foreign courts may demand the opposite outcome from one in respect of a more recognized foreign court.

[24] Author Donald Lange in *Doctrine of Res judicata in Canada*, 3 Ed. Lexus Nexis Markham: 210 outlines the philosophy for the doctrine to be as follows:"...the foundation of the doctrine is traditionally grounded upon two policy considerations: firstly, the ground of public policy that it is in the interests of the public that an end be put to litigation and secondly, the ground of the individual right that no one should twice be vexed by the same cause...."(at page four).

[25] Keeping in mind that philosophy, I find it to be consistent with common sense and logic that a court should be more likely to recognize a judgement of another court with respect to the outcome of the issues being litigated than would be the case of deciding whether to adopt a ruling on an evidentiary point such as the admissibility of documents that would normally be protected from admission by solicitor/client privilege.

[26] Based on all of the information before me including the transcripts of the proceedings in Florida, I am not satisfied that the solicitor/client privilege was waived. There was a suggestion that a waiver arose by virtue of the fact that the husband allowed access to the subject computer by his children and by the wife, a fact which he denies.

[27] The circumstances by which the hard drive was cloned are relevant to that conclusion. The clandestine behaviour by the wife must have some impact against her. She had copied a previous computer in the past and was admonished by the husband for doing so and she promised not to do it again. That event is not consistent with a conclusion that the husband allowed access to the computer and thereby waived privilege. Furthermore, the wife did not merely copy the hard drive (an event I am told that would leave traces of the fact that it had been copied); she instead had a professional information technology person "clone" the computer. She did not disclose to her husband the fact that she had done this until a significant period of time had passed. If she had access to the computer by way of the husband's permission, it occurs to me that she would not have seen fit to make such clandestine gestures in the course of obtaining the copy. Even if she had permission to access documents on the computer on occasion, she clearly did not have that permission on the subject occasion.

[28] The fact that the computer was owned by a company along with the above noted facts forces me to conclude that the wife's possession of the subject documents was at least inappropriate if not criminal. She must not be allowed to obtain unfair advantage by virtue of such behaviour.

[29] As for the conclusion by the Florida court that this case represents an exception to the doctrine of *res judicata* by virtue of the husband's fraudulent behaviour, my concern is that that issue was not fully investigated. I am satisfied that the husband, through counsel, attempted to gain permission to bring evidence to support his contention that there was no inappropriate or fraudulent behaviour. The admissibility decision was made with that request deferred. It would have been essential for the husband's side of that story to be heard before such an invasion of such a well protected and time honoured privilege should be ordered.

[30] Having concluded that there was no waiver of privilege and that there has not, before me, been a proven exception to the privilege (all of which is measured in the context of the wife's inappropriate behaviour in obtaining the information) I find that I must exercise my discretion to refuse to apply the doctrine of *res judicata*. Accordingly, that doctrine does not require me to admit the subject documents.

[31] Given this decision, there is no need to grant the requested adjournment awaiting the Florida appeal because no matter what its outcome will be I have decided that I will not, by virtue of the doctrine of *res judicata*, be bound by it. Additionally, the question of whether or not the legal requirement of the existence of a final order before *res judicata* is invoked occurs when a trial decision is under appeal does not need to be answered. This is so because I have decided that the doctrine does not apply in any event.

[32] In exercising discretion by rejecting the doctrine even if all three of the legal requirements have been met, I take some comfort from the fact that the Florida decision was a mere ruling on admissibility of evidence. This was not a question of whether or not to accept the foreign judgement on the issues being litigated. While I recognize that the discretion is limited, courts must be able to control their own process. It is entirely possible that rules of evidence would be different in the two jurisdictions and it would seem strange that this court would be bound by such rules in another country.

[33] Referring back to the philosophy stated by author Donald Lange, my decision to reject the doctrine of *res judicata* does not offend the goal of putting litigation to an end. This case faces a number of other preliminary motions and issues before it finally goes to trial. The trials will go ahead in some jurisdiction regardless of my decision. Neither does my decision cause a litigant to be “twice vexed by the same cause” if you consider the cause to be the issues being litigated. The parties may have been “twice vexed” by the need to argue solicitor/client privilege and its waiver or exceptions a second time but that is a minor preliminary step in the litigation process.

[34] In his brief, counsel for the husband has suggested that if I get to the answer that I have now rendered, I should wait until the jurisdictional hearings to freshly determine whether the documents ought to be admitted for reasons other than the application of the doctrine of *res judicata*. I will do so.

CAMPBELL, J.