

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Armoyan v. Armoyan , 2013 NSSC 432

**Date:** 20131131

**Docket:** Hfx. No. 409425

**Registry:** Halifax

**Between:**

Lisa Armoyan

Plaintiff

v.

Hripsime Armoyan and Geovex Investments Limited

Defendants

**Judge:** The Honourable Justice Patrick J. Murray

**Heard:** June 13, 2013, in Halifax, Nova Scotia

**Written Decision:** November 25, 2013

**Counsel:** Ms. Mary-Jane McGinty, for the Plaintiff  
Mr. George W. MacDonald Q.C. and Mr. Michael  
Blades, for the Defendants

**By the Court:**

**Motion #2**- Motion by Defendants for Plaintiff's action to be dismissed.

[1] The Plaintiff, Lisa Armoyan, filed a Notice of Action in November, 2012 in which she seeks to set aside the transfer of shares from her former spouse, Vrege Armoyan to his sister-in-law, Hripsime Armoyan (the first Defendant) with whom he held shares in the Defendant, Geovex Investments Limited, (the second Defendant). The Plaintiff says the shares could not have been transferred without the consent of the Defendant Company.

[2] The Plaintiff's claim is that the shares were transferred to deprive the Plaintiff of any judgment she might obtain in matrimonial proceedings commenced in Florida and in Nova Scotia. The Plaintiff states the shares should be returned to the transferor and held in trust in her favour, as they were transferred with fraudulent intent.

[3] The Plaintiff has pleaded the *Statute of Elizabeth* also known as the *Fraudulent Conveyances Act*, 1571, (13 Eliz.1), c. 5. The Defendants seek

dismissal of the Plaintiff's claim on two grounds: 1) Jurisdiction; and 2) Abuse of Process. The Defendants have not yet filed a Defence in the matter. The dismissal sought by the Defendants is without prejudice to the Plaintiff's right to recommence the proceeding at the appropriate time in the future.

[4] I have reviewed the Defendants' extensive motion and memorandum and material which includes the Affidavit of George W. MacDonald, QC, sworn on February 5, 2013. Similarly, I have reviewed and considered the Plaintiff's memorandum and Affidavit of Mary Jane McGinty, sworn on May 24, 2012. A reply brief of the Defendants' was filed on June 3, 2013.

[5] The Motion was heard on June 13, 2013. The Notice of Motion referred to *Rule 4.07* and *Rule 88* as well as the *Judicature Act of Nova Scotia*, RSNS 1989, c. 240. *Rule 4.07* allows a Defendant to make a motion to dismiss an action for want of jurisdiction, before filing a defence.

[6] *Rule 88* recognizes the inherent authority of a judge to control an abuse of the Court's processes and may provide a remedy that will control the abuse, which could include, among other things, dismissal.

## **Jurisdiction**

[7] The Defendants argue this Court does not have and should not exercise jurisdiction in respect of the Plaintiff's claim. The Defendants cite several reasons in support of their argument that the Court does not have jurisdiction.

[8] The first is that the *Judicature Act* confers jurisdiction over this proceeding to the Nova Scotia Supreme Court (Family Division) by virtue of the subject matter as contained in s. 32(A)(1) and specifically at s. 32(A)(1)(d) - rights to property and dispute among spouses or members of the same family; and also at s. 32(A)(1)(k) - enforcement of alimony and maintenance orders including reciprocal enforcement of Orders.

[9] The Defendants argue the purpose of the proceeding is critical in determining jurisdiction. The only reason for this proceeding is for the Plaintiff to recover on her \$17 million Florida judgment, obtained in the divorce proceedings. This is something they say which Campbell, J. assumed jurisdiction over in Nova

Scotia. Mr. MacDonald's affidavit contains as Exhibits the various Orders and decisions of the Honourable Judge Campbell in the Family Division.

[10] The Defendants jurisdictional argument has two tiers. The first being the legislation - the Judicature Act. The second being the jurisdiction exercised by Campbell, J., in his decisions over matters "arising from the matrimonial dispute between the parties".

[11] The Defendants argue that this proceeding seeks relief that arises from the matrimonial dispute. They state this action flows directly from and is inextricably bound to the breakdown of the marriage, and that the claim is based on an alleged matrimonial asset entitlement.

[12] I have read the pleadings of the Plaintiff in this matter. The action and statement of claim is primarily of one of alleged wrongdoing, namely fraud in respect of the transfer or conveyances of the shares. As stated, the statute upon which the Plaintiff relies is that of the *Statute of Elizabeth*.

[13] The Plaintiff submits she is not maintaining a property right per se, under the *Matrimonial Property Act*, R.S., c.275, s.1, but a reversal of the transfer due to fraud, necessitating a return of the shares to the transferor who is her former spouse.

[14] While it involves her former spouse, he is not named as a party to the action, nor is any right under the *Matrimonial Property Act*, claimed.

[15] The Defendants, in fact, acknowledge it is not “within” the divorce proceeding (described by the parties as the “debt proceeding”), but states it does arise from that dispute. It is not a proceeding for reciprocal enforcement or enforcement of a judgment. It may well be to ensure there are assets against which to enforce on that or any judgment.

[16] I don’t find this proceeding fits naturally into the provisions put forth by the Defendants pertaining to the Family Division. Even if it did, such jurisdiction is not deemed to be exclusive under the amendments to the *Judicature Act* as contained in s. 32(A). Section 32(A)(1) states it has the powers and duties possessed by the Supreme Court in relation to those matters enumerated.

[17] In terms of statutes, the *Statute of Elizabeth* is not listed in either of s. 32(A)(1) or s. 32(A)(2). “Court”, “Supreme Court” and “Supreme Court (Family Division)” are defined separately and have their own meanings.

[18] The Supreme Court, means the Supreme Court of Nova Scotia. It has historically held jurisdiction in cases involving the *Fraudulent Conveyances Act*. Examples of this are provided in the authorities provided by the Plaintiff in this matter, such as **Sable Mary Seismic Inc. v. Geophysical Services Inc.**, 2007 CarswellNS 559 (NSCA) and **Shah v. Jesudason**, 1999 Canlii 2239 (NSCA).

[19] This does not mean that the Nova Scotia Supreme Court (Family Division) could not consider a matter involving these statutes, where the subject matter would fall within the scope of matrimonial proceedings. This was the case in the **Johnson v. Johnson**, 2012 SKCA 87, submitted by the Defendants as authority for their argument that this proceeding falls within the jurisdiction of the Family Division.

[20] I pause here to state that the remedy sought is not a transfer to the Family Division but dismissal, because it ought to have been filed in the Family Division. Dismissal of a proceeding in its entirety is, the severest form of prejudice, and an extreme remedy. Here it is tempered by the Defendants' request that it is without prejudice to the Plaintiff's right to re-commence the action later, at the appropriate time.

[21] The Defendants further argue that the subject matter is something over which Justice Campbell assumed jurisdiction. I concur with the Plaintiff that this proceeding is a separate and distinct proceeding involving parties other than or in addition to the parties to the matrimonial proceeding, and is therefore separate.

[22] In **Johnson** the main issue was whether property registered in the wife's name ought to be subject to distribution under the *Family Property Act*, S.S.1997,c.F-6.3. The Court held the wife had no beneficial interest in the property, which was farmland transferred from her father. It was not family property. It was the wife's father who was alleged to have conveyed the property to his daughters to defeat his own creditors. The father was named as a Defendant.



[23] In **Johnson** the husband was claiming the property was matrimonial. That is not the situation in this proceeding. In **Johnson**, at paragraph 19, the Court stated “the issue is not whether there was a fraudulent conveyance to be set aside”. The issue which did arise and is similar to the present case is that, despite the wife being named on title, they hold that interest in trust for another. Ultimately, in **Johnson** the issue was whether the spouse had an interest. Jurisdiction was not an issue nor was it argued.

[24] There are other examples of cases over which the Family Division has assumed jurisdiction, involving statutes not listed in section 32 of the *Judicature Act*. An example is an action under the *Partition Act*. In **Soubliere v. MacDonald**, 2011 NSSC 98(FD), common law spouses were involved and sought a division of property, in which they held an interest during their co-habitation.

[25] Once again a review of the pleadings in the present case suggests that this proceeding is separate and distinct from the debt, divorce, or the matrimonial proceeding; both in the nature of the claim, fraud; and the relief claimed; an order

preventing further disposition until the judgment(s) against the transferor is satisfied.

[26] I see nothing in the purpose of the proceeding which ousts it from the jurisdiction of the Court it is in, even if the purpose of the proceeding is linked to a matrimonial proceeding.

[27] In **Seismic**, the Nova Scotia Court of Appeal recognized that a Plaintiff can seek to set aside a conveyance under the *Statute of Elizabeth* without having obtained a judgment (para 42). This shows that the actions are and can be separate from the judgment proceedings. Similarly in **Jesudason**, the Nova Scotia Court of Appeal dismissed an appeal from a decision which severed the debt action from the fraudulent conveyance action.

[28] I concur with the Plaintiff that this Court should not assume the alleged fraudulent conveyance proceedings took place in anticipation of the divorce proceedings.

[29] In addition to the actions being separate they are, in my view, also distinct. The pleadings show it is not the Plaintiff's right to the shares, but whether they were transferred to avoid enforcement, which is being claimed. I concur with the Plaintiff that this is different than claiming a property right in those shares.

[30] I am satisfied the cause of action pleaded is the *Statute of Elizabeth*, which on its face and historically does not fall within the exclusive jurisdiction of the Family Division. Under section 41 of the *Judicature Act*, the "Court" shall be the Court of law and equity in every proceeding, to be administered in accordance with those provisions.

[31] I note clauses 32A(1)(a)-(x) of the *Judicature Act* includes those matters by or under an enactment which shall be within the jurisdiction of the Family Division. Clause 32A(1)(w) refers to resulting trust or unjust enrichment involving persons who have cohabitated. The Plaintiff has plead in the alternative, that the shares be held in trust, which may arguably be a resulting trust.

[32] The Defendants' argue that the Court should not exercise its jurisdiction because the divorce proceeding is ongoing. Until there is a conclusion to that

proceeding, the Defendants' state it is redundant and a waste of the Court's resources for the matter to proceed. The Defendants have conceded that an outcome involving a stay would achieve that end.

[33] The Defendants further argue that the *Judicature Act* states that “ a multiplicity of proceedings should be avoided”, citing s. 41(g), as well as s. 12(2) of the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2d) Sess. c. 2.

[34] Once again, the basis for this argument is that it falls within the issues already before Campbell, J. It seems to me those issues involve a division of property which is matrimonial, and perhaps other assets, which are not matrimonial in the consideration.

[35] The Defendant, however, seeks a dismissal and not a transfer of the proceeding. The choice is there, either remedy may be sought.

[36] The *Judicature Act* grants jurisdiction to the Family Division in matters involving the interpretation of a marriage contract. The allegation here is one of

fraud. The cause of action as claimed is straight forward as is the remedy. The claim as filed alleges no breach of a marriage contract.

[37] Simply because the proceeding may be related to the divorce proceeding or because it arises from the divorce proceeding, does not mean it automatically falls within the jurisdiction of the Nova Scotia Supreme Court (Family Division).

[38] The amendments to the *Judicature Act*, upon my reading, did not eliminate the Supreme Court's jurisdiction to hear matters alleging fraudulent conveyances, involving persons and entities who are not spouses. With respect to the Defendants' "multiplying of proceedings" argument, I find it is proper to deal with it under the second prong of the Defendants' submissions, namely abuse of process.

### **Abuse of Process**

[39] The argument of the Defendants is based exclusively on the advancement of the Florida proceedings by the Plaintiff, when the Order and decisions of Justice

Campbell on September 5 and September 14, were designed to prevent further advancement.

[40] The Defendants argue that paragraph 4 of Justice Campbell's decision (on September 5) was to prevent the severe prejudice that would occur, due to one proceeding advancing and not the other.

[41] It is submitted by the Defendants that the key to their abuse of process position was the April, 2012 advancement, and the September 6, 2012 advancement of the Florida proceedings.

[42] By the Defendants' own admission there was complex and competing litigation ongoing in both Nova Scotia and in Florida. Their position is that this fraudulent conveyance action is a continuation of that abuse. Those proceedings say the Defendants, were not maintained but were advanced (after February 24<sup>th</sup>, 2012), constituting an abuse.

[43] As of the date of this motion the decisions of Justice Campbell and the matter of jurisdiction, (forum non-conveniens) have been under appeal to the Court of Appeal of Nova Scotia.

[44] This Court's role in determining an abuse of proceeding, in another proceeding and in another Court, has to be questioned.

[45] The ultimate question of which Court has jurisdiction and over what matters, must be determined. In the meantime, a finding that the parties abused one or another of a Court's Orders pre-supposes that Court had jurisdiction.

[46] I find this Court is not the best position, or even in a good position to make any such judgment.

[47] For the Plaintiff to be continuing the abuse, I would have to find there was an abuse of the Family Court's process, by the Florida process, without a determination as to the proper forum. I do note and have considered Justice Campbell's comments in his recorded decision that the prejudice he had hoped to prevent had in fact occurred. Still, it is not clear to me whether there was such a

breach, or if there was any abuse at all, without being in a better position to assess those Orders, and the proceedings giving rise to them. It seems the appropriate role for that is with the Court of Appeal, not this Court at this time.

[48] The Defendants argue the seed to this proceeding is the letter at tab “I” of Ms. McGinty’s affidavit wherein she states the purpose of the proceeding is to enable collection on the judgment from the matrimonial proceedings in Florida.

[49] I have reviewed the proceedings in this matter. They suggest to me the Plaintiff’s action in this Court is for a reason which is different than the other proceedings to which I have referred. The Plaintiff states this proceeding has not been commenced merely to achieve a different result in another Court. I concur. Having considered the affidavit evidence and the submissions made, I find the Defendants have not met their burden of proof on this motion.

[50] In my view, there is not clear, cogent or convincing evidence before me that an abuse occurred. Thus, I am satisfied that the motion (to dismiss) should be dismissed.



[51] Further, I am not satisfied on the balance of probabilities, that the Family Division has exclusive jurisdiction in this matter, if it has jurisdiction at all. The *Statute of Elizabeth* is not one of the listed statutes. The case law to which I have referred would indicate that a remedy under the statute is an equitable remedy which falls to the Supreme Court as defined in the *Judicature Act*, and within their powers of equity and chancery contained in section 41.

[52] Finally, I am not satisfied on a balance of probabilities that the evidence demonstrates an abuse of process by the Plaintiff, having considered all of the evidence and having considered, the pleadings in this matter.

[53] Nothing in the pleading satisfies me, on the standard of proof required in civil matters, that the action is frivolous or vexatious. The pleadings have not yet closed. In my respectful view, the action must stand and the motion should be dismissed.

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Murray, J