

SUPREME COURT OF NOVA SCOTIA

Citation: Armoyan v. Armoyan, 2013 NSSC 433

Date: 20131131

Docket: Hfx. No. 396221

Registry: Halifax

Between:

Lisa Armoyan

Plaintiff

v.

Anahid Armoyan

Defendant

Judge: The Honourable Justice Patrick J. Murray

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

Written Decision: November 25, 2013

Counsel: Ms. McGinty, for Lisa Armoyan
Mr. Michael Ryan, Q.C. and Mr. Richard Norman,
for Anahid Armoyan

By the Court:

Motion to amend and Transfer the proceeding to the Family Division

[1] In this proceeding the Plaintiff, Lisa Armoyan, seeks to set aside a transfer of a property to the Defendant, Anahid Armoyan. The property had been the matrimonial home of the Plaintiff and her former spouse, Vrege Armoyan. The Defendant is the mother of Mr. Armoyan.

[2] In seeking the relief requested, the Plaintiff pleads and relies upon the provisions of the *Statute of Elizabeth*, known as the *Fraudulent Conveyance Act*, 1571 (13 Eliz. 1) c. 5.

[3] The Notice of Action and Statement of Claim in this matter were filed on June 12, 2012. The Notice of Defence was filed by the Defendant on June 25, 2012.

[4] The Motion by the Defendant was filed on December 20, 2012. On this motion the Defendant seeks the following Orders:

- (1) An Order amending her Notice and Statement of Defence, and;
- (2) An Order transferring this proceeding to the Nova Scotia Supreme Court (Family Division).

[5] In this motion the Defendant relies on the pleadings in this action; the pleadings in the action in the Family Division (HFD - 1201-65036 (73536)); and the reasons of the Honourable Justice Campbell in his decision, **Armoyan v. Armoyan**, 2012 NSSC 323. The Defendant relies also on the Marriage Contract dated March 1, 2008, tendered as exhibit #4 in the hearing on jurisdiction in the Family Division, before Justice Campbell.

Issue #1 - Motion to Amend

[6] The ability to amend pleadings is dealt with by *Civil Procedure Rule 83.02*. The *Rule* requires that the amendment be made within 10 days after pleadings close, unless the parties agree or a judge permits otherwise.

[7] The law is clear, as previously stated in decisions of this Court. Generally, leave to amend will be granted unless the party opposing the amendment shows

that the mover is acting in bad faith or that the opposing party will suffer prejudice, which cannot be compensated in costs. (**Global Petroleum Corp. v. Point Tupper Terminals Co.**, [1998], 170 N.S.R.(2d) 367 (C.A.).

[8] The Defendant seeks to amend her Defence to include three amended paragraphs as follows:

13 : On October 20, 2010 one year after the Plaintiff petitioned for dissolution of marriage, the Certificate of *Lis Pendens* expired as per the governing Florida statute: Fla. Stat. §48.23(2).

22A:The Defendant says that the agreement is valid and precludes the Plaintiff from claiming an interest in the property. Further, or in the alternative, the Plaintiff transferred the Property to the Defendant by Warranty Deed dated July 22, 2008, and by that deed released any and all matrimonial interest which she ever had, now has, or may have in the future.

23:Vrege Armoyan petitioned this Court for the dissolution of the marriage on December 8, 2009. This proceeding was discontinued. He then petitioned again on December 22, 2010. The Plaintiff disputes the jurisdiction of this Court. On September 5, 2012 this Court held that it had jurisdiction to decide a number of outstanding issues as between Vrege Armoyan and the Plaintiff, including the validity of the Marriage Contract.

[9] One of these amendments has to do with the Certificate of *Lis Pendens* in Florida. The other two relate to the Marriage Contract and the decision on jurisdiction of Justice Campbell, rendered on September 5, 2012.

[10] I have reviewed the affidavits of Mr. Ryan sworn on May 21, 2013 and Ms. Kokochi on May 30, 2013. I have also read and considered the affidavit of Ms. McGinty and the briefs submitted by all parties. The former affidavit (Mr. Ryan) relates mostly to the transfer motion.

[11] The Defendant submits there is no bad faith which has been demonstrated here. Further, they are simply updating the defence with new information and strengthening it. As far as prejudice is concerned, they say none has been demonstrated and disclosure had only recently been completed before the motion was filed. "Granting these amendments would not cause serious prejudice to the Plaintiff which could not be compensated in costs", states the Defendant.

[12] The affidavit of Ms. McGinty has been filed in support of the Plaintiff's position on this motion. The main argument in opposition to the amendments is that they raise issues which are unrelated to the fraudulent conveyance action. The Plaintiff submits there is no connection between the Marriage Contract and the fraudulent conveyance action. In essence then, the Plaintiff says the amendments are not relevant to this action.

[13] I note the original Deed from the Plaintiff to her former spouse was based on the Marriage Contract. That is not to say the Marriage Contract is at the heart of this proceeding, as the Defendant argues. I note that the Marriage Contract was referred to in the original Defence filed, shortly after the Notice of Action (see paragraphs 3, 5, 6, 7, 9 and 11). The marital agreement, however, is not referred to in the Statement of Claim. It is the *Statute of Elizabeth* which is pleaded, not the *Martimonial Property Act*, R.S. c. 275, s.1.

[14] I am satisfied that the amendments as requested should be permitted. My reasons for doing so are based on the test. Arguably, it is prejudicial to plead matters which are not relevant. Apart from that consideration, prejudice has not been demonstrated by the Plaintiff. Relevancy will be for the trier of fact.

[15] The Plaintiff to some extent raised the issue of bad faith in her brief. In oral argument, however, that allegation was essentially withdrawn. The Court was asked to ignore, for example, paragraph 45(a) of the Plaintiff's brief. Instead, the Plaintiff discussed the motive for the amendments as "oblique".

[16] With respect to the *lis pendens* amendment (proposed as paragraph 13 of the amended defence) while the Florida proceeding was not specifically referred to in the previous defence, it was referred to in the Plaintiff's Statement of Claim. The *lis pendens* itself states that an interest was claimed, and that interest was based on the marriage. There, (in Florida) the Plaintiff claims the Court was asked to declare the Marriage Contract void and thus, the Deed void (see Exhibit "C" of the affidavit of Ms. McGinty). That is different submits Ms. McGinty than what is being claimed now by the Plaintiff, in this proceeding.

[17] In terms of prejudice the Plaintiff has argues (at paragraphs 45(b) and (c) and 48 of her brief) that the subject matter of these amendments has already been adjudicated upon. It is, therefore, an abuse of process for the Defendant to seek them. The Plaintiff states the Court should not be asked again to litigate these issues.

[18] In arriving at my decision, on these amendments, I do so without regard to the jurisdiction question. The test requires me to consider prejudice and bad faith. I am satisfied the Plaintiff has not demonstrated bad faith. In terms of prejudice,

the Court will not usurp the role of the Court of Appeal in assessing proper jurisdiction, and thus, whether the matters have already been properly litigated.

[19] Given that the current pleadings already contain references to the subject matter of these amendments, and that the amendments were sought in a timely manner, after the close of pleadings (in particular, disclosure), I am satisfied the test for granting the amendments has been met by the Defendant.

[20] The Defendant's motion is therefore granted.

Motion to Transfer to Family Division

[21] The Defendant presents a number of arguments in support of its motion to transfer this matter to the Family Division.

[22] The Defendant submits that the Family Division has jurisdiction pursuant to a s. 32(A)(i)(d) - rights to property in disputes among spouses or members of the same family; and s 32(A)(1)(v) - the interpretation, enforcement of a marriage contract, cohabitation agreement, separation agreement or paternity agreement.

[23] The Defendant submits that this proceeding, at its core, is a dispute about matrimonial property, namely the matrimonial residence. The marriage contract and the Warranty Deed to the matrimonial residence are proper matters for interpretation in the Family Division.

[24] The Defendant further submits the affidavit of Mr. Ryan, containing a portion of a transcript of evidence, given by the Defendant in another proceeding. In that, the Plaintiff states, essentially that the divorce proceeding underlies this action and the action under S.H. 409425.

[25] The Defendant further relies on the decision of Justice Campbell, in **Armoyan v. Armoyan**, 2012 NSSC 323 (FD), in which it was found that Nova Scotia is the proper jurisdiction. The marriage contract submits the Defendant is at the heart of that proceeding and the present proceeding.

[26] The Plaintiff's position may best be described by referring to para. 28 of her brief where she states that the fraudulent conveyance action is concerned only with the intention of those parties effecting the transfer of the property. Ms. Armoyan

makes no assertion this is matrimonial property, nor is she claiming a proprietary interest.

[27] The Plaintiff further submits that the jurisdiction to determine matters under the *Statute of Elizabeth* lies with the Supreme Court as defined in Section 2(i). This jurisdiction stems from it being the court of original jurisdiction at common law and equality in both civil and criminal cases.

[28] The Plaintiff maintains a claim for relief under the *Statute of Elizabeth* is a claim for equitable relief, and therefore, a claim in equity, under s. 41. Therefore, the jurisdiction is exclusive to the General Division and the Court of Appeal.

(Hughes v. Noreham Electric, 1915 Carswell Ont 12 (SCC); Donahue v. Hull Brothers and Co., 1895 Carswell NWT 344 (SCC).

[29] The Plaintiff argues a matter can only be transferred from the General Division, if it could have been commenced in the Family Division by virtue of s. 32(C)(3). This matter, says the Plaintiff, could not have been commenced in the Family Division.

[30] The Defendant submits the case of **Soubliere v. MacDonald**, 2011 NSSC 98 (FD), as an example of a case that was transferred to the Family Division from the Supreme Court. It involved a woman's claim to a division of property (the house) under the *Partition Act*. There was a cohabitation agreement. The Defendant submits the dispute in **Soubliere** is similar to the case at bar.

[31] The Plaintiff maintains that under the *Civil Procedure Rules*, no other person may be added as a party to a divorce action, except with permission of the Court (*Rule 59.05(4)*).

[32] The Florida *Lis Pendens* claimed an interest in the property, and that said interest was based on the Plaintiff's marriage. The Florida *Lis Pendens* is now being pleaded (in Defence) by the Defendant.

[33] The Defendant argues that the transfer motion is somewhat dependent on the proposed amendments. The Plaintiff pleads the *Statute of Elizabeth*, not the *Matrimonial Property Act*, R.S., c.275, s.1.

Decision

[34] The starting point in any decision on the motion to transfer is that only matters which could have been commenced in the Family Division ought to be transferred there. I say ought but the word is “may” in Section 32(C)(3), meaning they are not required to be transferred, even if the proceeding could have been started there.

[35] In determining whether this proceeding “could be” commenced in the Family Division, the Defendant argues that the proceeding at its core is a dispute about matrimonial property, namely the matrimonial residence.

[36] Applying s 32(A)(i)(d), one might say this is a dispute about property between former spouses, or members of the same family. I think, however, the approach must be more discerning than that.

[37] Applying s 32(A)(1)(v), dealing with the validity of a marriage contract, presents a more compelling case for a transfer to the Family Division in this case. As earlier noted, the Defendant has pleaded provisions of the marriage contract as

a complete defence to this action, by virtue of the release the Defendant says was given by the Plaintiff (in section 8) to any future claims.

[38] That brings me to the central point, which is what Lisa Armoyan is claiming in this proceeding. Is she claiming a matrimonial interest in the property? Is she relying on the marriage contract to prove or establish her claim(s) in this proceeding?

[39] I have read **Soubliere**. I agree it is an example of a case where a claim under legislation (the *Partition Act*) not mentioned in Section 32(A)(1) or (2) was transferred from the General Division to the Family Division. It was also clearly a dispute between two common law spouses directly, involving the home in which they cohabitated, and in which the parties were claiming a monetary interest, which interest had to be divided having regard to their agreement.

[40] I find the circumstances here to be somewhat different than those in **Soubliere**.

[41] I do not accept that this motion to transfer is dependant on the amendments, in that, if I allowed the proposed amendments, I should transfer the proceeding, or vice versa. The Defence prior to that the proposed amendments, had already contained references to the marriage contract. Because of those references, and the amendments which I have allowed, the validity of the marriage contract, is more central to this proceeding .

[42] I would concur that if the issue is a dispute about matrimonial property between spouses or former spouses, a transfer would be appropriate, as the proceeding could have (and should) have been commenced in the Family Division.

[43] I find, however, that it is not, because the central issue to be decided here is whether there was a fraudulent conveyance by one party in the divorce proceeding to another party, whom is not a party in the divorce proceeding. The *Statute of Elizabeth* is the statute being relied upon here by the Plaintiff to establish her claim.

[44] It is my view that the only parties to the divorce proceeding should be the spouses (or former) themselves, unless the Court decides otherwise. The *Civil Procedure Rules* support this view.

[45] Just because the property which is the subject of the fraudulent conveyance claim is the former matrimonial home does not, of itself, justify or require that it be determined by the specialized court of the Family Division.

[46] Historically, and under the provisions of the *Judicature Act*, the Supreme Court has exercised jurisdiction over matters involving the *Statute of Elizabeth*. I have not been provided with a single case by the Defendant, to illustrate otherwise.

[47] Regarding the affidavit of Mr. Ryan, even if I accept that the divorce proceeding underlies both of the actions in 396211 and 406425, that is not a reason to conclude that a transfer should follow or that this court should not exercise jurisdiction.

[48] By this proceeding, the Plaintiff is attempting to protect a future judgement, be that a judgement of the Court in Florida or Nova Scotia.

[49] The potential for difficulty does arise in regard to the Defendant's defences. The validity of the marriage contract, is clearly a matter within the Family Division's jurisdiction. As noted by the Defendant counsel, even if the Family Division has jurisdiction, it would not be exclusive.

[50] I find in the result, that it is the *Statute of Elizabeth* and not the *Matrimonial Property Act* which has been pleaded by the Plaintiff. Now is not the time, on this motion, to decide the case on its merits or on the pleadings. The conveyance sought to be overturned by the Plaintiff is that to the Plaintiff's mother-in-law. The Plaintiff's former spouse is not named in the action.

[51] I do not accept, on this motion that the marriage contract is at the heart of both proceedings, even if it is relevant to both proceedings.

[52] I have considered the Defendant's argument that this is a sensitive matter involving family members requiring the privacy procedures available in the Family Division.

[53] I have reviewed the **Coldfoot Publishing v. Foster Jaques**, 2012 NSCA 83, case submitted by the Plaintiff. The *Civil Procedure Rules* do provide for privacy, but it is not automatic. A Court must be presented with convincing evidence to restrict disclosure or order a file sealed. Otherwise, the open court principle applies. In my view, I have no such evidence before me.

[54] I am satisfied that while the matters are personal, this alone is not a reason to transfer the proceeding, having considered the circumstances before me.

[55] I therefore dismiss the Defendant's motion to transfer this proceeding.

Murray, J.