
CANADA / JUDGMENT

Doman v. Ciccozzi

2014 BCSC 866

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 866 Doman v. Ciccozzi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Doman v. Ciccozzi,

2014 BCSC 866

Date: 20140516

Docket: E122734

Registry: Vancouver

Between:

Darlene Lynn Doman

Claimant

And:

Roberto Carlo Ciccozzi

Respondent

Before: Master Bouck

Reasons for Judgment

Counsel for the Claimant:

J. Hittrich

Counsel for the Respondent:

T. Jackson

Place and Date of Hearing:

Vancouver, B.C.

April 28, 2014

Place and Date of Judgment:

Vancouver, B.C.

May 16, 2014

Introduction

- [1] In this family law action, the respondent husband seeks orders largely concerning document production. As a corollary to the document production order, Mr. Ciccozzi asks the court to impose a financial penalty on the claimant pursuant to s. 213 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"). In addition, the respondent seeks to enforce the terms of an earlier pronounced order which required the claimant to contribute equally to the cost of a custody and access report. The respondent proposes that the claimant's share of that cost be deducted from interim spousal support payments.
- [2] The claimant argues that the application for document production is misguided at best and an abuse of process at worst. Ms. Doman says that most of the sought-after documents actually in her possession and control have been produced, but that some of the requested documents either do not exist or are otherwise unavailable.
- [3] Ms. Doman will consent to an order that she make best efforts to obtain and produce the documents which are relevant and material to the issues between the parties. It is suggested that not all of the requested documents fall within that description. Finally, the claimant submits that some of the information requested by the respondent is not actually document disclosure but rather facts that are more suitably explored at examinations for discovery.

Facts

- [4] The parties have filed extensive affidavit material. A detailed recitation of the facts presented is unnecessary for the purposes of these reasons.
- [5] The parties agree that their marriage was brief (three to seven weeks, depending on the determined date of separation). The marriage followed an eight-year period of cohabitation during which time the parties' son was born. The parties also parented Ms. Doman's son from a previous relationship.
- [6] The respondent is a successful architect whose reported annual income ranged from \$400,000 to nearly \$1,000,000 during the relationship. The respondent was always the breadwinner, although some income splitting resulted in Ms. Doman receiving a salary from the respondent's company.

- [7] The parties separated in the summer of 2012. This action was commenced in early September of that year.
- [8] On April 5, 2013, Master Caldwell made various interim orders including that the respondent pay to the claimant both spousal support of \$11,000 per month and child support for the two children of \$4,500 per month. The court determined Mr. Ciccozzi's income at \$652,000 for the purposes of this interim support order. The combined support of \$15,500 per month has been the claimant's sole source of acknowledged income to date.
- [9] The parties are now divorced. Parenting issues were resolved in a final consent order made on January 20, 2014. In that order, Ms. Doman agrees to share equally in the cost of a report provided by Dr. M. Elterman. Ms. Doman has made no payment whatsoever towards this expense.
- [10] The financial issues between the parties will be tried in September 2014. Although examinations for discovery were conducted in September 2013, the questions focused on parenting matters. Due to the schedules of counsel, a continuation of the parties' respective examinations will not take place until July 25, 2014.
- [11] The issues to be resolved at the upcoming trial include a determination of the parties' incomes, the claimant's entitlement to spousal support -- or at least the duration of that support -- and how family assets and debt is to be shared between the parties.
- [12] The respondent's first request for some of the information and documentation which is the subject matter of this application was made on March 19, 2013. The respondent asked for delivery of the information and documentation within two weeks. No documents were provided.
- [13] Despite this action having been commenced one year earlier, the claimant made her first list of documents on September 12, 2013. In an affidavit sworn that same day, Ms. Doman deposes that:

If I am made aware of additional documents that are relevant to these proceeding [sic], I will disclose them forthwith and add them to my List of Documents.

- [14] A second request for information and documentation was made to the claimant in December 2013. That request significantly expanded upon the material sought to be provided. The respondent queried whether an application would be necessary to compel document production. Again, no additional documentation was delivered by the claimant.
- [15] On March 21, 2014, a third request was made by the respondent for document disclosure. Claimant's counsel was further advised that the respondent was in the process of preparing this application.

- [16] The claimant acknowledges receiving these requests through her counsel. Ms. Doman also concedes that little or no effort was made to address the requests until this application was threatened. Ms. Doman says that until recently all of her energies were directed towards resolving parenting issues.
- [17] On March 25, 2014, some of the documents and information sought by the respondent was delivered by the claimant. By that time, however, preparation of this application had begun and the material provided was deemed to be incomplete.
- [18] Since this application was filed on April 7, more information and documentation has been received. The claimant submits that "eighty percent" of the respondent's requests have now been answered. The balance of information is either unavailable to Ms. Doman at this time or does not exist.
- [19] While accepting that disclosure has occurred, the respondent says that such disclosure is both incomplete and too little, too late.

Discussion

- [20] The legal principles which govern this application are not in dispute.
- [21] As recently stated by Punnett J, non-disclosure or delayed disclosure of financial information is a costly impediment to the timely and just disposition of family disputes: *J.D.G. v. J.J.V.*, 2013 BCSC 1274 at para. 1.
- [22] Since July 1, 2010, most of the leading authorities addressing document production have been decided under the SCCR. Nonetheless, the language used in both Rule 7-1 of the SCCR and Rule 9-1 of the SCFR is identical. Thus, those leading authorities can be applied in a family law context.
- [23] Where the SCFR and SCCR differ is in some of the stated objects of these procedural rules. The document disclosure obligations under the SCFR must be interpreted in a manner which, among other things, minimizes conflict and promotes cooperation between the parties: Rule 1-3 (a)(ii).
- [24] This objective is echoed in the FLA, a statute which may not govern substantive remedies in this particular proceeding but certainly impacts the processes involved. The remedies now available under the FLA with respect to delayed or inadequate document disclosure have been said to place an even greater emphasis on a party's disclosure obligations: *J.D.G. v. J.J.V.*
- [25] The respondent relies on Rules 5-1 and 9-1 of the SCFR. For the purposes of this application, I have assumed that the requests for document production fall within Rule 9-1 (10) and (11) which allow for a broader disclosure of documents beyond a party's initial listing obligation. In that regard, a party may not be required to provide evidence of the existence of a certain document as a requirement for a production order: *XY, LLC v. Canadian Topsires Selection Inc.*, 2013 BCSC 584.

- [26] Arguably, the court should promote greater rather than lesser document disclosure in a family law context, particularly with respect to financial issues. That is because the courts have long recognized the non-disclosure of financial information to be "the cancer of matrimonial property litigation.": *Cunha v. da Cunha*, [1994] B.C.J. No. 2573 (S.C.). Nevertheless, document disclosure requests made in a family law action may still be considered overly broad: *Ghuman v. Ghuman*, 2012 BCSC 1647.
- [27] The respondent's notice of application seeks production of some 31 types of documents or information. In submissions, Ms. Jackson divided those 31 requests into categories in order to demonstrate the relevancy of the document or information. One category of documents might be relevant to Ms. Doman's employability and ability to achieve self-sufficiency. Another category might be relevant to the question of alleged asset dissipation by the claimant.
- [28] I agree that the documentation and information requested is relevant to the financial issues to be determined at trial. However, I find that some of the requests either do not relate to document production or must await the outcome of the examinations for discovery.
- [29] The respondent has requested production of the documents and information within seven days of the court's order. While appreciating that the respondent's requests have been outstanding for more than a year, this timeline is too tight. Furthermore, the proper order would require that the claimant to amend her list of documents, serve that amended list and make the originals available for inspection by the respondent: Rule 9-1 (11).

Document Production Orders

- [30] With respect to the items requested under paragraph 1 of the notice of application, the following orders are made:
1. The claimant shall, by no later than 5 p.m. on June 13, 2014, amend and serve her list of documents, which list shall include items 1 a. through o., s., t., u., bb. (but only documents relating to the claimant's father's estate and not a self-created accounting) of the notice of application together with correspondence identifying any documents in those items which have not been produced and the reason for the non-production.
- [31] As an aside, I appreciate that some explanation has been already provided with respect to many of these items. Furthermore, it will be up to the trial judge to determine whether a credit card statement constitutes a receipt for a particular expenditure.
2. The claimant shall provide the respondent with:
 - a. her 2012 and 2013 income tax returns within 10 days of filing; and
 - b. any notices of assessment or reassessment with respect to those filings within 14 days of receipt of the notice from CRA.

3. The relief sought in paragraphs 1 p., q., r., v., w., x., y., z., aa., bb. (with respect to a self-created accounting of monies received from the estate) is adjourned generally with liberty to re-set the application following examinations for discovery.
4. The claimant shall, by no later than 5 p.m. on June 13, 2014, make available for inspection to the respondent and his counsel items 1.237, 1.243 and 1.246 from the claimant's list of documents dated September 12, 2012, or provide an explanation in writing as to why all or some of those documents are not available for inspection.

Remedy under s. 213 of the FLA

[32] I now address whether the respondent is entitled to a remedy under s. 213 of the FLA.

[33] Justice Punnett's decision in J.D.G. v. J.J.V. is both persuasive and binding upon me. A few key concepts that emerge from that decision have already been touched upon in these reasons. Other important concepts are:

- s. 213 is to be used to secure proper disclosure in a timely and cost efficient way. It therefore requires robust application to accomplish that end: para. 25;

- [if] the responding party makes disclosure prior to the hearing that may justify a lesser penalty. That said, the fact that the applicant had to bring the application should, notwithstanding the late production, be addressed both because of the expense incurred but, as well, the delay itself: para. 29;

- each case will be fact dependent, but there is also a general deterrent element involved in that any order should increase the awareness of the importance of timely and complete disclosure and over time lead to fewer applications: para. 25.

[34] There ought to be no debate that disclosure in this case has been delayed. While neither party strictly followed the SCFR in the issuance of their respective list of documents, the claimant's initial document disclosure occurred only on the eve of examinations for discovery. Furthermore, most of the documents listed by the claimant simply mirror items found on the respondent's earlier provided list. By the claimant's own admission, very little effort was made to provide document disclosure until the respondent raised the spectre of this application.

[35] The claimant says that issues concerning parenting have prevented timely document disclosure. In my view, this is not an acceptable excuse. The claimant has been aware of the respondent's requests for more than one year. While no doubt preoccupied with the parenting issues, there seems to be an ability to provide information once notice of this application was provided and despite alleged ongoing parental conflicts.

- [36] Mr. Hittrich is willing to take some blame for the delay but the disclosure is ultimately the claimant's responsibility. It is she who has access to the banking records and various other documents ordered to be produced. It is she who deposed to an affidavit promising further disclosure.
- [37] The claimant says that the delay in disclosure has not been wilful. On my reading of *J.D.G. v. J.J.V.*, a finding of deliberate or wilful non-disclosure is not a pre-requisite to making an order under 213. Such a finding was necessary before the court could impose a fine under s. 92 of the Family Relations Act, R.S.B.C. 1996, c. 128, but the FLA has expanded upon this type of remedy and the circumstances that will invoke the remedy.
- [38] The claimant also says that the respondent's requests for the additional disclosure have been made sporadically and thus ought not to be taken as urgent or even necessary. As examinations for discovery in the matter will take place so close to trial, document disclosure ought to be as complete as possible by the time those examinations are conducted. Furthermore, given the positive obligations on a party with respect to disclosure under the SCFR, the respondent should not have been required to make a request for further disclosure at all.
- [39] In this case, the disclosure occurred because the respondent proceeded with this application. The respondent was not entirely successful, but that does not mean that the entire application was unnecessary.
- [40] I find that a penalty and costs consequence ought to be imposed on the claimant. The respondent has sought a penalty of \$5,000 and special costs thrown away. Given that disclosure did occur prior to the hearing of this matter (albeit not complete), I impose a penalty of \$500. The fine is to be paid by no later than June 30, 2014. If the fine is not paid by June 30, 2014, the respondent may deduct the sum from the July 1, 2014 spousal support payments: FLA, s. 213 (2)(d). I am satisfied that the claimant can make this payment by June 30th without having to forgo any basic necessities.
- [41] I am not persuaded that special costs are appropriate, but will award the respondent lump sum costs of \$1,500 payable in any event of the cause. The costs will not be payable forthwith.
- [42] In making this order, I am mindful of the need to reduce conflict between the parties and promote settlement. However, no such settlement can be achieved without full and complete disclosure.

Dr. Elterman's Fees

[43] The final relief sought by the respondent is an order allowing him to deduct the claimant's share of Dr. Elterman's costs from future interim spousal support payments. The claimant now somewhat resiles from the consent order in which she agreed to reimburse the respondent for one-half of Dr. Elterman's total costs. Ms. Doman says that the term was "forced on me". The claimant also says that she is in debt to counsel and hopes to make payment to the respondent over time. No payment schedule is suggested.

[44] The respondent is seeking the enforcement of a final order of the court. In my view, the order sought does not fall within the parameters of PD-42, item 9, and could only be made by a justice of this court. Accordingly, this aspect of the notice of application is adjourned generally with liberty to re-set in judges' chambers.

"C.P. Bouck"

Master C.P. Bouck

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