CITATION: Garnet v. Garnet et al, 2016 ONSC 949
NEWMARKET COURT FILE NO.: FC-12-41430-00
DATE: 20160208

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Matthew David Alexander Garnet Applicant	Evelyn Rayson, Counsel for the Applicant
– and –	
Christine Denise Garnet Respondent	Julie Stanchieri, Counsel for the Respondent
Additional Respondents	
Pasquale Lamanna 2293273 Ontario Inc. Renaissance Fine Homes Inc.	Mark Klaiman, Counsel for the additional Respondents

HEARD: February 3, 2016

RULING ON MOTION

JARVIS J.:

[1] This is a Motion by the respondent ("the wife") for an Order for document production from a third party who opposes the relief sought. The applicant ("the husband"), although initially taking no position, maintains that his wife's disclosure request is yet but another in a pattern of serial such requests which, in terms of the information sought, has now become disproportionate, particularly in light of what has already been produced by him and, just as importantly, is a stratagem intended to further delay a 10 day arbitration scheduled to start on April 18, 2016. There have already been three adjournments to the arbitration.

Background

[2] The parties were married on July 17, 2004 and separated on August 15, 2012. There are two children of the marriage, both boys, ages eight and five and a half who primarily reside with their mother. The husband started this Application on August 23, 2012. He is a real estate developer: the wife has been a homemaker. The third party is a business partner of the husband, and involved in a development project with him. It is the value and future profitability of that project which impacts the equalization and support issues in the outstanding proceedings between the spouses.

[3] Excepting issues relating to the parenting of their children, the parties agreed to arbitrate all other issues on June 11, 2014. Several interim awards have been made by the arbitrator. In an award dated May 20, 2015 the arbitrator dealt with a request by the wife that the husband produce a non-exhaustive list of documents to allow an expert cost consultant to assess the project soft costs of the development in which the husband and third party were involved on the valuation date, and currently. The wife maintained then, and does now, that soft cost disclosure is required by her valuation expert, that the husband's assertions that the project will lose money are untrue and that the husband and third party have conspired to keep from her the disclosure needed. The husband has argued that while he has no objection to producing the documents ordered by the arbitrator, those documents are in the third party's possession, over whom he has no control.

[4] The third party was not given notice of the Motion heard by the arbitrator but, after the interim award was made, the husband's lawyer advised that while the third party refused to provide the documents he (the third party) was prepared to allow wife's counsel to attend at the third party's offices to review, and copy, documents there. This was confirmed by the lawyer representing the third party in early August, 2015. The arbitration, which had already been rescheduled to proceed later in August, was adjourned to December 2015.

[5] In a further award made October 19, 2015 the arbitrator adjourned again the arbitration start date to February 2016 because miscommunication problems between counsel left no opportunity for the third party document review. The arbitrator observed that "matters in relation to third party disclosure, which lie outside my arbitral jurisdiction, must be pursued diligently, to ensure that the Arbitration is completed expeditiously." In that award, as observed again in a further award made December 16, 2015, the arbitrator commented that he was "not satisfied that [the husband] had expended the necessary effort to ensure [the third party disclosure sought] is made available in a timely manner" (October 19) and expressed (December 16) his incomprehension that "production of [the third party disclosure has] not been facilitated to a greater extent" by the husband to "expedite the completion of this case."

[6] The genesis of the spousal parties' return to the arbitrator for direction in mid-December, 2015 was an October 22, 2015 letter from husband's counsel to the wife's counsel advising that the third party's lawyer had advised him that the third party "does not trust

[the wife] and will no longer allow [the wife] unfettered access to the company's records." The arbitrator also had this to say,

> 13. In Christine Garnet's December 8, 2016 Affidavit, she states that she intends to bring a Motion against Matthew Garnet in the Superior Court of Justice Family Court at Newmarket on January 20th, 2016. I express no opinion as to whether this Motion is proper given the terms of the Mediation/Arbitration Agreement. The extent to which the court will grant any relief against Matthew Garnet must be considered in determining whether or not to adjourn the arbitration, although I would be far less inclined to grant any adjournment if I found that Christine Garnet's approach to matters (in relation to disclosure and/or procedure) was an abuse of process or otherwise designed to cultivate delay.
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> 14. Ms. Stanchieri submits that the disclosure sought by Christine Garnet should not be ignored in favour of a "negative inference" approach to the arbitration. Ms. Stanchieri urges the importance of balancing the need to have this matter concluded once and for all (on one hand) with the need to ensure that the evidence is complete and that the hearing is fair (on the other hand).
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> 15. Ms. Stanchieri submitted that there is no evidence of prejudice to Matthew Garnet occasioned by an adjournment of the arbitration. I agree; indeed, none is alleged. Although Ms. Rayson disagreed with the following characterization, Ms. Stanchieri submitted that her client did not wait until the "eleventh hour" to seek an adjournment; I agree.
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> 16. It would be wholly inconsistent with my role as defined in the Mediation/Arbitration Agreement to grant an indefinite adjournment of the arbitration as sought in paragraph 2 of Christine Garnet's Notice of Motion. When pressed for a suitable commencement date for the arbitration, assuming that an adjournment was granted, Ms. Stanchieri proposed the last 2 weeks of April 2016, a reasonable interval of approximately 8 weeks.
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> 17. Although Ms. Rayson urged me to dismiss the Motion (i.e., to refuse an adjournment), indicating that an adjournment to late April was "not ideal", she conceded that she could "live with it" if necessary. Ms. Rayson made these comments while urging me to make an adjournment peremptory on Christine Garnet.
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> 18. The issue of whether or not the February 2016 arbitration date would be peremptory to either party (or both parties) was canvassed in my previous Award. In granting yet a further

> adjournment at the request of Christine Garnet, I am tempted to impose such a condition. Since I have not made a finding of bad faith against Christine Garnet; I have not found that her ongoing disclosure or adjournment requests are an abuse of process or otherwise designed solely to cultivate delay; and, most importantly, since outstanding matters depend, of necessity on third parties (i.e., the disclosure of O'Keefe data upon Matthew so authorizing; the disclosure of Lamanna documents should the court so order; any further relief ordered by the court against Matthew Garnet; and the possibility that an expert such as Mr. DeBresser is unable to complete any further review or report and for such report to be delivered as required by the *Family Law Rules*, I decline to make the adjournment peremptory on Christine Garnet.

[7] The award made by the arbitrator adjourned the arbitration from February 22, 2016 to April 18, 2016.

[8] In his affidavit sworn January 22, 2016 the third party alleged that the reason why he was opposing the wife's Motion was that after she had received certain information from the husband, the third party and his wife were contacted in early 2015 by Canada Revenue Agency ("CRA") to audit them and a company involved in the development project. The CRA officials were identified by name and told the third party that the audit was being conducted as a result of a "tip" from the wife. The wife has denied this allegation. She pointed out that in one of the affidavits sworn by the husband in these proceedings he acknowledged certain conduct that could involve CRA scrutiny and she also indicated that a CRA request to her former lawyer for a copy of the husband's questioning was refused. How exactly this ties into a CRA audit of the third party is not patently, but is certainly inferentially, obvious.

Analysis

[9] I do not propose to review in any detail the voluminous material that the parties have filed nor the analysis done by the wife detailing what she submits are material, suspicious discrepancies in the husband's evidence, his productions and the third party's affidavit. Suffice it that, in my view, the following facts inform my analysis:

(a) the third party was contacted in early 2015 by CRA and, although he does not disclose the date when the CRA officials told him that their audit was prompted by a tip by the wife, it is reasonable to infer that third party knew then about the wife's contact;

(b) the third party's lawyer was aware of the award made on May 20, 2015 that the husband facilitate the production of the documents in his client's possession when he wrote to husband's counsel that the third party was only prepared to have the wife review, and copy, the disclosure that the third party had at his offices;

(c) if the third party was prepared to facilitate the disclosure requested when, as he says, he knew the wife had contacted CRA, and he did not trust her, there is no reasonable explanation why he waited for almost two and a half months afterwards to withdraw his cooperation. I will deal with the argument about a possible breach of the deemed undertaking rule by the wife later in this Ruling;

(d) without determining the probity of the disclosure in the third party's possession, the arbitrator was not prepared (although invited to do so by the husband) to "find that the production [of the soft cost disclosure documents] are of such tangential relevance or are so disproportionate to the issues in dispute as to restrict [the wife's access to them]." It is clear that many of the arguments made before this court by husband's counsel have been earlier made to the arbitrator;

(e) the arbitrator ordered the husband to produce, and facilitate the production of, the disclosure requested and noted, at least twice, that the husband was less than enthusiastically cooperative with that part of the award, despite the husband's evidence otherwise;

(f) the parties' affidavits offer competing explanations for the project's profitability which, in part, are dependent on a soft costs analysis.

[10] Family law arbitrations are governed by the *Arbitrations Act*, S.O. 1991, c. 17 and the *Family Law Act* and, in the event of a conflict, the latter Act prevails.[1] Paragraph 9.7 of the parties' Arbitration Agreement requires the parties, unless they agree otherwise, to comply as in court proceedings with the *Family Law Rules*.

[11] *Family Law Rules* 19 (11) and 20 (24) deal with documentary disclosure from a non-party and the confidentiality obligation imposed on the recipient of that disclosure.

> (11) If a document is in a non-party's control, or is available only to the non-party, and is not protected by a legal privilege, and it would be unfair to a party to go on with the case without the document, the court may, on motion with notice served on every party and served on the non-party by special service,
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> (a) order the non-party to let the party examine the document and to supply the party with a copy at the legal aid rate; and
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> (b) order that a copy be prepared and used for all purposes of the case instead of the original.
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> (24) When a party obtains evidence under this rule, rule 13 (financial disclosure) or rule 19 (document disclosure), the party and the party's lawyer may use the evidence and any information

[1] S. 59.1 (2) of the *Family Law Act*.

> obtained from it only for the purposes of the case in which the evidence was obtained, subject to the exceptions in subrule (25).

[12] The third party in this case is not a signatory to, or bound by, the Arbitration Agreement signed by the spousal parties and so the arbitrator has no jurisdiction to order production against him. But that does not preclude this court from ordering such disclosure in appropriate circumstances: *Lafontaine v. Maxwell*, 2014 ONSC 700 (CanLII).

[13] In *Lafontaine*, disclosure was ordered from non-party business associates of the husband. Accepting that considerable efforts had already been made by the husband and non-party in that case to answer the wife's information requests, the court was not prepared to disagree with the arbitrator's decision that certain specified information needed to be produced. This case is little different in my view. No appeal was taken by the husband to the award made by the arbitrator on May 20, 2015 that documents be produced and, equally as pertinent, the arbitrator expressed no view about the relative probity of the disclosure sought.

[14] The third party has objected to providing any further information in light of the wife's alleged breach of the implied undertaking rule as now reflected in the confidentiality obligation set out in *Family Law Rule* 20 (24). In *Disher v. Kowal*, 2001 CarswellOnt 3778, [2001] O.J. No. 4184, [2001] O.T.C. 769, 109 A.C.W.S. (3d) 43, 14 C.C.E.L. (3d) 63, 56 O.R. (3d) 329 (ONT. S.C.J.) breach of the implied undertaking rule was determined to be an abuse of process and the action in that case permanently stayed. In *Kinsmen Club of Kingston et al v. Walker*, 2014 CarswellOnt 153, [2004] O.J. No. 137, [2004] O.T.C. 41, 128 A.C.W.S. (3d) 249, 3 C.P.C. (6th) 227, 69 O.R. (3d) 453 (ONT. S.C.J.) an action against a litigation guardian was also permanently stayed. Neither case had presented special circumstances that warranted departure from the range of possible consequences for breaching the implied undertaking rule in civil proceedings. That relief is available in family cases pursuant *Family Law Rule* 20 (26) which provides as follows:

> (26) The court may, on motion, give a party permission to disclose evidence or information obtained from it if the interests of justice outweigh any harm that would result to the party who provided the evidence.

[15] The third party has relied on *Disher* and *Kinsmen* to dismiss the wife's Motion but, as already noted, there is no satisfactory evidence why if the third party's mistrust of the wife was sufficiently unimportant before the arbitrator made his awards to raise then (when agreeing to allow the wife to review and copy the information in his control) it has become so important now for the third party to raise as an objection to the relief sought in the wife's Motion. I note too that the change in the third party's position in late October 2015 was not long before the (then) scheduled start of the December arbitration which the husband was pressing the arbitrator (and argued in this court) should proceed expeditiously, and peremptory to the wife. Moreover, in *Lafontaine* there was no evidence from a qualified, independent accounting professional indicating that the wife's

requests in that case were unreasonable, excessive or unfair. There is none in the Motion before me.

[16] Without expressing a view whether there has been a breach of Rule 20 (24) by the wife, nor what remedy might be available to the third party if a breach is proven, I am not prepared to dismiss the wife's Motion. Nor is it necessary, in light of the Rule, that the wife sign a confidentiality agreement as ordered in *Lafontaine* (and to which the wife is agreeable in this case). I suspect that will only delay the disclosure being expeditiously obtained.

[17] Accordingly, the relief requested in paragraph 1of the wife's Motion dated January 18, 2016 is granted. In the event that costs are sought by any party, submissions shall be submitted in writing not to exceed three-double spaced pages along with Bills of Costs and Offers to Settle (if any) upon which the party may be relying to be filed with the court as part of the Continuing Record by no later than February 19, 2016. Any Authorities should be separately filed, but not as part of the Record.

[18] In making this Order, I expressly refrain from making any comment about the arbitrator's awards or what directions in future he should make in terms of disclosure or the timing of the arbitration.

Justice D.A. Jarvis

Date Released: February 8, 2016