NOVA SCOTIA COURT OF APPEAL

Citation: Armoyan v. Armco Capital Inc., 2011 NSCA 22

Date: 20110216
Registry: Halifax

Between:

Docket: CA 330968

Lisa Armoyan

Appellant on Costs Appeal

v.

Armco Capital Inc.

Respondent on Costs Appeal

And Between:

Docket: CA 326710

Armco Capital Inc.

Respondent to
Costs Application

v.

Lisa Armoyan

Applicant for Costs

Judge(s): Hamilton, Fichaud, and Beveridge, JJ.A.

Appeal Heard: January 19, 2011, in Halifax, Nova Scotia

Held: Leave to appeal costs decision granted and appeal allowed.
Costs order requiring Ms. Armoyan to pay costs in the amount of $12,031 is set aside and replaced with an order requiring Armco Capital Inc. to pay costs forthwith to Ms. Armoyan in the amount of $2,500 including disbursements.
Ms. Armoyan's application for costs relating to Armco's discontinuance of its appeal of the jurisdiction decision is dismissed.
Dates set for submissions on costs of appeal.

Counsel: Christine Doucet and Mary Jane McGinty, for Lisa Armoyan
Colin Piercey and Matthew Pierce, for Armco Capital Inc.

Reasons for judgment:

[1] Armco Capital Inc., the respondent, is a Nova Scotia company of which the appellant's estranged husband, Vrege Armoyan, and his brother, George Armoyan, are directors. Armco applied in the Nova Scotia Supreme Court on December 11, 2009, for an order declaring that the appellant, Lisa Armoyan, had unlawfully copied the hard drive of one of its computers and requiring her to return the copy to it and refrain from using or communicating the information contained on it.

[2] On January 12, 2010, Ms. Armoyan, a resident of Florida, made a motion in the same court for a dismissal or stay of Armco's injunction application. She alleged that the Nova Scotia Supreme Court had no jurisdiction over her or the subject matter of Armco's application or, if it did, that Florida rather than Nova Scotia was the convenient forum for Armco's causes to be determined. Ms. Armoyan's jurisdiction motion was heard by Justice Gerald R.P. Moir on February 11, 2010.

[3] Two days prior to the hearing of her jurisdiction motion in Nova Scotia, Ms. Armoyan appeared in the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida before Judge Kenneth D. Stern on her motion to have that court take possession of the copy of the hard drive of Armco's computer that she had made. She argued that this was necessary to preserve the information on the hard drive for disclosure in the divorce proceedings she had commenced there in October 2009, as otherwise the Nova Scotia court on her jurisdiction motion may order her to return it to Armco.

[4] The Nova Scotia judge was informed of the Florida hearing. At the end of the hearing on Ms. Armoyan's jurisdiction motion, he requested a copy of the transcript of the February 9, 2010 proceedings before Judge Stern.

[5] In his March 17, 2010 (2010 NSSC 102) decision on Ms. Armoyan's jurisdiction motion, the judge found that while he had jurisdiction to decide Armco's application, Florida was the convenient forum. He was satisfied Armco could intervene in the Florida divorce proceedings to the extent necessary to have its causes determined. He sought and received written submissions on costs from the parties.

[6] Armco appealed the judge's jurisdiction decision on March 30, 2010. Despite being the successful party, Ms. Armoyan cross-appealed on April 13, 2010.

[7] The judge issued his costs decision with respect to Ms. Armoyan's jurisdiction motion on June 2, 2010 (2010 NSSC 206). Rather than award costs to Ms. Armoyan as the successful party, he ordered her to pay costs of $12,031 to Armco. This amount included a $10,031 disbursement, to reimburse Armco for the money it paid to its forensic accountant to determine whether she had copied its computer. On June 16, 2010 Ms. Armoyan applied for leave to appeal and appealed the costs decision.

[8] The appeal and cross-appeal from the jurisdiction decision and the appeal from the costs decision were set down for hearing. On September 14, 2010, three days before its factum was due to be filed, Armco discontinued its appeal of the jurisdiction decision. On September 29, 2010, Ms. Armoyan discontinued her cross-appeal of the jurisdiction decision. She also indicated she was seeking costs from Armco with respect to its discontinuance of its appeal of the jurisdiction decision.

Costs Decision

[9] The judge heralded his thoughts on costs in his jurisdiction decision when he criticized Ms. Armoyan's lack of candour and use of tactics, which he concluded added to the cost of litigation:

> [15] Counsel's remarks to Judge Stern make it clear that Ms. Armoyan copied the hard drive at issue in this proceeding. Much expense could have been saved had Ms. Armoyan been as candid with Armco and this court as she was, when it suited her interests, with the Florida Circuit Court. That goes to costs, no matter the outcome.
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> [58] Ms. Armoyan, through counsel, told Judge Stern that the hearing to take place before me on February 11th could result in Ms. Armoyan being required to turn over the copy, with loss of relevant information. That was untrue.

> [59] When Ms. Armoyan indicated she wished to make a motion in this proceeding about jurisdiction, Armco readily agreed to an adjournment of its application without day. The motion heard on February 11th was Ms. Armoyan's, not Armco's. It was for a dismissal or stay of the Armco application. It was impossible that Ms. Armoyan could have been ordered to turn over the copy.
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> ...
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> [62] The apparent misrepresentation about the process of this court, and the possibility that the motion was made in Florida as a tactic, may be addressed by the parties in submissions about costs.

[10] In his costs decision the judge states:

> [2] As I said in the main decision, Ms. Armoyan was not candid with Armco or this court about whether she had copied the hard drive. ...
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> [5] This court is most concerned about the injustices that can result from the cost of litigation. Consequences are necessary when we see tactics that make a motion more complicated, and thus more expensive, than is necessary. The same goes for the second point, where we see a deliberate lack of candour causing significant expense in the preparation for, commencement of, and presentation of evidence for a proceeding.
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> [6] Ms. Armoyan is focussed on her successful motion. I am taking a broader view. Her lack of candour started with her reply when Mr. George Armoyan asked whether she had copied the hard drive, which includes information about his businesses. So, Armco had to pay an expert $10,031 to determine whether the laptop had been copied, it had to gather evidence from various witnesses on whether Ms. Armoyan had had it copied, and it had to start a proceeding and present evidence tending to show that she had done so.
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> [7] All of this was a waste because the only real issue is whether Ms. Armoyan rightly copied the hard drive.
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> [8] ...By depriving Ms. Armoyan of costs, providing a small contribution to Armco's expenses on the proceeding, and requiring reimbursement for the unnecessary disbursement, the court provides fair compensation for the expense unnecessarily caused by Ms. Armoyan's lack of candour.

Issues

[11] The two matters now before us are (1) whether the judge erred in awarding costs against Ms. Armoyan on her jurisdiction motion and (2) whether she is entitled to costs as a result of Armco discontinuing its appeal of the jurisdiction decision.

Standard of review

[12] On the first issue, the threshold for overturning a costs award on appeal is high. A costs award may only be overturned on appeal if the judge made an error in principle or was plainly wrong; **Hamilton v. Open Window Bakery Ltd.**, 2004 SCC 9; [2004] 1 S.C.R. 303.

[13] As to the second issue, this comes to us at first instance and no standard of review is applied. I am satisfied we should decide this matter, rather than refer it to a chambers judge as anticipated by **Civil Procedure Rules** 90.46(2) and 90.37, because neither party objects to us doing so and it is the most efficient way to deal with it, given how the matter has proceeded to date.

Florida Decisions

[14] Before dealing with the two issues before us, I must determine what use we should make of the two Florida decisions Ms. Armoyan forwarded to the Court just prior to the hearing of her appeal. Ms. Armoyan does not ask that we consider these cases for the principles of law they embody. Nor does she ask that we accept as fact, the facts found by the two courts in those decisions. Rather, she asks us to consider these cases in light of her argument on the costs appeal. Her argument is that the judge erred in principle and was clearly wrong because, instead of addressing the limited issues before him on her jurisdiction motion, jurisdiction and *forum conveniens*, his costs award addressed Armco's causes that will be determined by a Florida court as a result of the judge's decision. She argues that the costs relevant to Armco's causes, including the timeliness of her admission that she copied the hard drive, should be determined by the Florida court that deals with her copying the hard drive and the use that can be made of it, because it will have

all of the relevant evidence and argument before it which the judge did not have. She argues that these two Florida decisions, Judge Stern's in particular, indicate the ongoing multifaceted nature of the Florida litigation and highlight the danger of the judge deciding costs on an issue not before him and yet to be determined.

[15] The first Florida case is Judge Stern's December 15, 2010 decision (the Stern Decision). Judge Stern has since retired and has been succeeded by another judge who is reviewing the decision. It is a decision of the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County, Florida, in the matter of Lisa Armoyan and Vrege Armoyan. Armco was granted limited intervener status in that proceeding with respect to the information copied from the hard drive.

[16] The Stern Decision dismissed Vrege Armoyan's application to have Ms. Armoyan's Florida counsel and accountants disqualified from acting for her in the divorce proceeding. Mr. Armoyan had argued that they should be disqualified because they received privileged information relating to him as a result of Ms. Armoyan copying the hard drive of Armco's computer, giving them an unfair informational or tactical advantage in the divorce proceeding. Judge Stern states that the reason he ordered the disclosure of this information to Ms. Armoyan's counsel and accountants was because Mr. Armoyan represented to him that the computer contained "no personal information relative to [the divorce]. It's all proprietary information pertaining to ARMCO". Judge Stern was subsequently satisfied that the copied documents were relevant to the divorce proceedings on the issue of Vrege Armoyan's concealment of assets and the residency of the parties. He was unprepared to reward Mr. Armoyan by disqualifying Ms. Armoyan's counsel and accountant for what the judge found was Mr. Armoyan's intentional and repeated misrepresentation as to the nature of the contents of the hard drive.

[17] Judge Stern stated:

13. In the case at bar, respondent/Husband, through his apparently unsuspecting attorney of record, Melinda Gamot, misrepresented to this Court that the hard drive in question contained *only* corporate material, much of which involved corporate trade secrets. There was a categorical assertion by Ms. Gamot that "there is no personal information relative to this case. It's all proprietary information pertaining to Armco." . . . When asked if she personally had examined the entire hard drive, she candidly stated that she has no personal knowledge of what is on the hard drive, and that she had relied on Affidavits filed in the Court in Nova Scotia, where an action was instituted in an unsuccessful attempt to create an alternate forum to litigate issues involved in this case; that Court promptly deferred to this Court as the appropriate forum. Two and a half months later, said counsel represented that "[w]e don't think there's any marital asset records on that hard drive that she cloned." . . . Counsel of record herein for Armco, the small wholly-owned company of which Respondent is one of two owners, and which was denied intervention herein but which was limited to participation solely to protect any trade secrets on the hard drive, categorically asserted that the information on the computer was corporate information . . . and that the information "belongs to us, not anybody else in this room. . . . She [Petitioner/Wife herein] should be enjoined from disseminating it, because the only party that could get harmed is my client [Armco]. *Id*. at p. 27.

14. *Relying on these statements made by the Respondent/Husband through his attorney and by the attorney for a corporation of which he is the owner of a half interest, both attorneys, acting as the Husband's agents and clearly acting on information provided by him, this Court issued its Order appointing retired Circuit Judge Walter N. Colbath, Jr. as a special Master to review the documents, to determine which contain corporate proprietary information and which, if any, relate to this case*. This Court in related Orders provided for review of any and all documents related to this case by Wife's counsel and his office staff and by Wife's forensic CPA and his office staff, but to no one else without further Order of this Court. *Thus, it was the Husband's categorical and disingenuous assertion,* through his attorneys, that the hard drive contained *only* information belonging to the corporation *that led this Court to authorize immediate distribution by special Master Colbath of copies of documents related to this case to the Wife's attorney and CPA, and their respective office staffs.* The pretense that the computer contained no data of a personal nature clearly was intended to create the false perception that immediate return of all material on the hard drive, and copies thereof, could in no way deprive the Wife of relevant material helpful to her case.

16. Now that the cat is out of the bag and the existence of relevant material on the hard drive is manifest, the Husband, having failed to thwart the administration of justice by the use of deception on this Court, the Fourth District

> Court of Appeal and the Nova Scotia Court, seeks to disqualify the Wife's attorney and CPA in a new attempt to derail this case. This Court will not reward the Husband's attempts in this and two other Courts, to thwart the discovery of the truth and to prevent the resolution, on an informed basis, of all the issues between the parties.
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> 22. Any prejudice to the Husband's case has been caused by his own actions. He invited this Court's Order authorizing confidential review by the Wife's counsel and CPA of the allegedly non-pertinent documents by pretending that nothing in the documents could help the Wife's case herein. Having lied to the Court to obtain one result, he induced another result less to his liking. This is not inadvertent disclosure, it is something else. The Husband committed a continuing fraud upon two, possibly three, courts. He should not be able to benefit thereby.

[18] The second Florida decision is a Report and Recommendation by Judge William C. Turnoff, dated December 23, 2010 (the "Turnoff Decision"). It is a report and recommendation of the United States District Court, Southern District of Florida in the matter of Vrege Armoyan and Lisa Armoyan. Armco was not involved with this proceeding but advises us that it is being disputed.

[19] The Turnoff Decision dismissed Vrege Armoyan's Hague Convention application to have his two daughters returned to Canada. They are living in Florida with Ms. Armoyan. In his decision, Judge Turnoff was critical of Mr. Armoyan (pp. 2-3):

> It is important to note at the outset that this action is by no means the typical Hague Convention case. Petitioner's filings herein amount to nothing more than a carefully orchestrated scheme to overwhelm Respondent financially by forcing her to defend herself in numerous causes of action filed by Petitioner in multiple jurisdictions. As part of his relentless pursuit, Petitioner, through his Amended Petition, . . . which was filed under seal and submitted *under oath*, managed to manipulate this Court into taking immediate action. (p. 2)

> Consistent with the above , it is this Court's finding that the Amended Petition . . . was frivolous and vexatious from its inception. In this Court's view, Petitioner's abuse of the judicial process warrants, at a minimum, the imposition of attorney's fees and costs. ... (p. 3)

[20] Judge Turnbull found that the true purpose of the application was "to harass, intimidate, and quite frankly, bully" Ms. Armoyan – "while at the same time conveniently continuing to delay the underlying dissolution of marriage proceedings". He stated that Mr. Armoyan "has relentlessly used his vast means and resources to initiate litigation geared solely towards delaying a determination as to support payments, and forcing [Ms. Armoyan] to defend herself on limited means." He found that Mr. Armoyan's actions were an abuse of the judicial system warranting, "at a minimum, the imposition of attorney's fees and costs."

[21] I am satisfied we should consider these cases in the limited manner requested by Ms. Armoyan. They are relevant to whether the judge erred in awarding costs as he did. They illustrate that the proceeding before the Nova Scotia judge was a small part of the ongoing divorce litigation in Florida. They highlight the importance of having the judge who has all of the relevant evidence and arguments concerning the copying and use of the hard drive information, decide costs.

First Matter

[22] I will now deal with Ms. Armoyan's appeal from the judge's costs decision. Did he err in awarding costs and disbursements to Armco in the total amount of $12,031?

[23] The judge ordered Ms. Armoyan to pay costs to Armco with respect to her jurisdiction motion because (1) she refused to tell Armco whether she had copied the hard drive until cross-examination at the jurisdiction hearing and (2) because of her "tactic" of appearing before Judge Stern two days earlier to have her copy of the hard drive preserved. He found these increased the costs and complexity of the parties' litigation.

[24] Judges have a broad discretion when it comes to ordering costs but their discretion must be exercised judicially, in a principled manner. Inherent in the judicial exercise of their discretion is recognition of the principle that a successful party is generally entitled to his or her costs except for very good reasons and that costs will only be ordered against a successful party in exceptional circumstances, including misconduct; Mark M. Orkin, **The Law of Costs**, 2nd ed. looseleaf (Aurora, Ont.: Canada Law Book, 1987) at pp. 2-63, 2-89.

[25] Examples of misconduct that have led courts to make awards against successful parties are rare and include where a party swore a false affidavit, **MacKay v. Bucher**, 2001 NSCA 171, **Stanadyne Inc. v. Supreme Metal Products Inc.**, [1985] O.J. No. 611 (H.C.J.); where there was serious non-disclosure and several misstatments by one party in the course of litigation, prior to trial, **Singh v. Singh**, [1992] O.J. No. 3123 (Gen. Div.); where it was found there was "collusive and discreditable intrigue" on the part of agents of the successful company, **Wismer v. Javelin International Ltd.** (1982), 38 O.R. (2d) 26 (H.C.J.); where one party acted in a high-handed manner although not in actual breach of a contract, **Williams v. 572270 Ontario Inc.**, [1995] O.J. No. 298 (Gen. Div.); and where the successful party failed to bring the relevant section of a statute to the attention of the court, **Joanisse v. Union of Canada Life Insurance** (1987), 27 C.C.L.I. 164.

[26] I am satisfied the judge erred in principle and was clearly wrong in awarding costs against Ms. Armoyan. Her actions in the proceeding before him do not constitute the type of exceptional circumstance or misconduct that warrants an award of costs against her.

[27] Nothing required Ms. Armoyan to answer the questions posed to her by her estranged spouse, his brother or Armco's counsel in the fall of 2009. Her reluctance to answer these questions in light of the suggestion in Armco's counsel's letter that her copying of the hard drive may be in breach of s. 322 (theft) or ss. 183 and 184 (illegal interception of private communications) of the **Criminal Code**, R.S.C. 1985, c. C-46, is understandable. When asked during cross-examination if she had copied the hard drive, she answered honestly.

[28] The only issues before the judge were whether he had jurisdiction or whether Florida was the more convenient forum. The issue of whether Ms. Armoyan had copied the hard drive and what use she could make of it was not before him, contrary to paragraph 7 of his costs decision:

> All of this was a waste because the only real issue is whether Ms. Armoyan rightly copied the hard drive.

[29] The Florida Court will determine those issues after all of the relevant evidence and arguments are before it, not on the bare bones contextual evidence that was before the judge on the jurisdiction motion. It will be in the best position to determine costs after taking into account the timing of Ms. Armoyan's admission that she had copied the hard drive, the appropriateness of her motion before Judge Stern on February 9, 2010 and any misrepresentation she made to Judge Stern as to the possible outcome of the jurisdiction motion.

[30] It is incongruous that the judge's decision awards costs for this matter against Ms. Armoyan, whom Judge Stern said was the victim of her husband's "continuing fraud upon two, possibly three, courts. He should not be able to benefit thereby." The judge did not have the benefit of the Stern Decision, which was issued after the judge's costs decision. But the judge did request the Florida transcript, rely on it in his costs award, and comment in his jurisdiction decision:

> [63] ...I needed to know what exactly the Florida court was doing in order to provide the deference comity demands. If more should be before us, the deficiency is the result of my default.

[31] Once the Florida transcript is used for the Nova Scotia costs award, then the "more [that] should be before us" for purposes of the appeal includes the Stern Decision. Though that decision is not the subject of the transcribed proceeding itself, it relates to the use of the hard drive and the litigation strategies employed by the divorcing litigants. These topics in turn were subjects on which the Nova Scotia judge focussed in his costs award. From the Stern Decision, it is clear that the contents, usage in litigation, and costs consequences of the hard drive matter are best left for the Florida court which has seizure and the benefit of the full

evidentiary context. This essentially follows from the judge's ruling that Florida, not Nova Scotia, was the *forum conveniens*. I am not adopting, for this decision, the findings of the Florida rulings that were based on evidence not in the record here. But it is my view that the judge here erred in principle by using isolated comments from the Florida transcript to determine costs in this Nova Scotia matter, instead of just leaving that item, the costs related to copying the hard drive, for the Florida Court to assess in the context of the Florida litigation.

[32] Ms. Armoyan agrees that the Florida Court will have the ability at the appropriate time to deal with costs and disbursements relating to her actions in connection with copying the hard drive and failing to admit it prior to the hearing before the Nova Scotia judge.

[33] Accordingly, I would grant leave to appeal, allow Ms. Armoyan's costs appeal and set aside Moir J.'s costs order of $12,031. In connection with her jurisdiction motion, I would order Armco to pay costs forthwith to Ms. Armoyan in the amount of $2,500 including disbursements.

Costs on discontinuance of jurisdiction appeal.

[34] I will now deal with Ms. Armoyan's application for costs as a result of Armco's discontinuance of its appeal of the jurisdiction decision.

[35] She is correct that there is a presumption that a respondent is generally entitled to costs if an appellant discontinues its appeal. **Civil Procedure Rule** 90.46 provides:

> **90.46 (1)** A party may discontinue an appeal or cross-appeal by filing a notice of discontinuance.
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> **(2)** On filing the notice of discontinuance, the appeal or cross-appeal is at an end and the other party is entitled to costs of the appeal or cross-appeal, unless a judge orders otherwise.

[36] This same **Rule** applies when a cross-appeal is discontinued.

[37] That being the case, and taking into account that Ms. Armoyan also discontinued her cross-appeal of the jurisdiction decision, I am satisfied Ms. Armoyan's application for costs should be dismissed and each party should bear their own costs with respect to the discontinuance of their appeal and cross-appeal of the jurisdiction decision.

[38] At the hearing before us, Ms. Armoyan requested an opportunity to address costs of this appeal once our decision is released. Accordingly, I would ask Ms. Armoyan to provide her written submissions on costs of this appeal to us no later than March 1, 2011 and Armco to provide its written submissions in response in writing no later than March 11, 2011.

Hamilton, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.