CITATION: Granofsky v. Lambersky, 2019 ONSC 3251
COURT FILE NO.: FS-15-00400249-0000
DATE: 20190530

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
RENA GRANOFSKY	)	*Harold Niman and Anita Vo*
	))	Applicant
Applicant	))	
	))	
– and –	))	
	)	
	)	
LEONARD LAMBERSKY	)	*John T. Syrtash*, Lawyer for the R
Respondent	)	
	)	
	)	
	)	
	)	

HEARD: May 21, 2019

ENDORSEMENT

DIAMOND J.:

Overview

[1] This proceeding was commenced in January 2015. Since then, the applicant has encountered consistent, significant difficulties in obtaining disclosure from the respondent.

[2] The applicant brought a motion returnable on March 14, 2019. That motion sought the following relief:

- an order finding the respondent to be in breach of various court orders requiring him to comply with disclosure obligations.
- an order imposing a monetary penalty in such amount as the court deems just.

- an order striking the respondent's pleadings and permitting the applicant to proceed by way of an expedited, undefended trial; and,

- costs of the motion on a full recovery basis plus applicable H.S.T.

[3] At the original return of the applicant's motion, the respondent requested an adjournment. Counsel for the parties then proceeded to negotiate a potential resolution of the applicant's motion, and through some considerable effort a consent order was ultimately reached. That consent order, signed by Justice Moore on March 14, 2019, required the respondent to comply with various prior court orders and complete the following steps on or before April 15, 2019;

(a) to comply with various life insurance terms including designating the applicant as the irrevocable beneficiary of an insurance policy in the total amount of $1,141,666.00;

(b) to bring into good standing all expenses associated with various Florida condominium properties including but not limited to property insurance and taxes;

(c) to provide proof that (a) he had formally retained a certified business valuator ("CBV"), who was to produce an income report and business valuation of the respondent's business interests, and (b) he had supplied the CBV with all necessary information/documentation required to prepare the report and valuation; and,

(d) to comply with various disclosure requests of the applicant's lawyers dated February 27, 2019.

[4] Justice Moore's consent order further provided that in the event the respondent failed to comply with any of the above obligations, the applicant could bring her motion back on five days' notice for the appropriate sanctions. The respondent also agreed to pay the applicant her costs of the motion (up to that point) fixed in the amount of $5,000.00, together with costs of a previous settlement conference fixed in the amount of $3,000.00

[5] While the respondent did deliver some additional information/documentation, upon reviewing the new disclosure, the applicant took the position that the respondent remained in breach of both Justice

Moore's consent order, and by incorporation, the prior court orders. Accordingly, the applicant renewed her motion which was argued before me on May 21, 2019.

[6] At the conclusion of the hearing, I took my decision under reserve.

Issue #1 1s the respondent in breach of Justice Moore's consent order?

[7] Both parties filed voluminous affidavits. The applicant sought to show that the respondent was in continuous, significant breach of various court-ordered obligations, some of which have been in place as far back as 2015. The respondent swore affidavits claiming to have complied with all his court-ordered obligations, or in the alternative, explaining why the applicant's position was incorrect as the respondent was unable to comply due to external forces, third parties or health issues.

[8] I have reviewed the extensive material filed by both parties. At the hearing, the applicant filed a Compendium enclosing a chart setting out the specific terms of Justice Moore's consent order that remain outstanding. Based upon my review of the evidentiary record, the applicant's Compendium is accurate and thus I see no need to set out the history of the respondent's various breaches in this Endorsement. The respondent either complied in part with some court-ordered obligations, or not at all. To the extent that the respondent claims that he was unable to comply with his obligations due to reliance upon third parties, this was obviously an exigency which he ought to have taken into account before he entered into a consent order to deliver information/documentation by the agreed-upon deadline of April 15, 2019 (which deadline was merely the latest in a series of previous missed deadlines).

[9] As of the hearing of this motion, the respondent had yet to obtain and confirm that the applicant was named as the irrevocable beneficiary for the full, agreed upon amount of $1,141,666.00. The respondent did not bring the Florida condominium expenses into good standing. The respondent failed to provide his personal income tax returns and notices of assessment for the 2016-2018 years, and failed to deliver any corporate income tax returns or proper financial statements for numerous companies in which he maintains an interest. The respondent also failed to produce complete copies of bank statements and credit card statements for those companies.

[10] Most if not all of the above disclosure obligations have been outstanding for approximately four years, and form part of several court orders including Justice Moore's consent order. I agree with the position of the

applicant as set out in her Compendium, and find that the respondent is indeed in breach of Justice Moore's consent order.

[11] Accordingly, the answer to Issue #1 is "Yes".

Issue #2 Is the relief sought by the applicant available on this motion?

[12] As stated, the applicant has requested the following relief on this motion:

- an order imposing a monetary penalty in such amount as counsel advises and the Court deems just.
- an order striking the respondent's pleadings and permitting the applicant to proceed by way of expedited undefended trial, and/or
- any other sanctions the Court deems appropriate.

[13] As pointed out during the hearing, the applicant is not seeking a finding under Rule 31 of the *Family Law Rules* that the respondent is in contempt of Justice Moore's consent order, or any other prior order. The provisions of Rule 31(5) specifically authorize the Court to, *inter alia*, order a person found in contempt to pay a fine in any amount that is appropriate, or pay an amount to a party as a penalty.

[14] As the relief sought by the applicant is not premised upon a finding that the respondent is in contempt, the respondent argues that the Court has no jurisdiction to impose a fine or other monetary penalty.

[15] With respect to a failure to disclose relevant documentation, Rule 19(10) provides that in the event a party does not obey any order made under Rule 19, the Court may in addition to any power to make an order under Rule 1(8) or 1 (8.1),

(a) order a party to give another party an affidavit, let the other party examine a document, or supply the other party with a copy free of charge;

(b) order that a document favourable to the party's case may not be used except with the Court's permission; or

(c) order that the party is not entitled to obtain disclosure under these rules until the party follows the rule or obeys the order.

[16] There is no explicit provision under Rule 19(10) authorizing the Court to order a monetary fine or penalty in the event a party fails to disclose relevant documentation.

[17] Under Rules 1(8) and 1(8.1), if a person fails to obey a court order, the Court may deal with that person's breach by making any order that it considers necessary for a just determination of the matter (other than a contempt order which must be brought on motion), including:

(a) an order for costs;

(b) an order dismissing a claim;

(c) an order striking out a pleading;

(d) an order that all or part of a document that was required to be provided but was not, may not be used in the case;

(e) an order that a party is not entitled to any further court order unless the court orders otherwise; and

(f) an order postponing the trial or any other steps in the case.

[18] Simply put, the respondent takes the position that due to the fact that the court's explicit authority to order a fine or monetary penalty is set out in Rule 31 only, the relief sought by the applicant on her motion cannot be granted. The respondent relies upon the decision of Justice Monahan in *Shapiro v. Feintuch* 2018 ONSC 6746 (CanLII), and in particular the following excerpts (my emphasis in **bold**):

> **"The $2500 payment sought by the Respondent is not on account of legal fees or disbursements incurred in connection with this proceeding. Rather, it is a payment over and above any of his fees and disbursements. The Respondent argues that ordering such a payment is appropriate since otherwise, the breach of the Order will not have any consequences**. He relies on numerous judicial statements to the effect that "an order is an order, not a suggestion" and that noncompliance with court orders must have real consequences. He also makes reference to *Price v. Putnam*, a recent decision of the Ontario Court of Justice, which appears to have ordered a payment of $10,000 on

account of "costs" under Rule 1(8)(a), in order to deter a party from ignoring court orders in the future.

There is legal authority in the *Family Law Rules* for ordering one party to make a payment to another party, but only in circumstances where the court finds a person in contempt of court. Rule 31(5)(c) provides that where a finding of contempt is made, the person in contempt may be ordered to pay "an amount to a party as a penalty". But there has been no such finding sought or made in this proceeding and thus Rule 31 cannot provide legal authority for the payment sought by the Respondent.

In my view, an order for "costs" under Rule 1(8)(a) only permits an order in respect of the reimbursement of legal fees and disbursements. To the extent that *Price v. Putnam* proceeds in a different basis, I decline to follow it. Since the $2500 payment sought by the Respondent is not on account of legal fees and disbursements, it falls outside of the scope of Rule 1(8)(a). **The Respondent does not advance any other basis upon which such an order can be made**. Accordingly, I dismiss this aspect of the Motion."

[19] The applicant argues that the respondent's failure to abide by the terms of Justice Moore's consent order is simply the latest in a long and protracted series of breaches of not only court orders, but simple and fundamental disclosure obligations imposed upon all parties to family proceedings. As the respondent has already been ordered to pay the applicant's costs on numerous prior occasions (and he has paid those costs), another costs order - no matter how substantive - would simply be "more of the same", and not accomplish anything. The applicant submits that given the respondent's non-disclosure track record to date, something other than a simple costs order is necessary in order to ensure that the applicant obtains the necessary information/documentation to enable her to advance her claims for support and equalization at trial. As this proceeding is already more than four years old, and a finding of contempt is consistently viewed by the relevant jurisprudence as a "last option", the applicant argues that the relief sought on this motion is appropriate.

[20] The applicant relies upon the decision of Justice Van Melle in *Mantella v. Mantella* 2008 CanLII 48648 (ONSC). In *Mantella*, Justice Corbett had

made an order requiring the respondent to provide disclosure by a set deadline. Justice Corbett further ordered that in the event the respondent failed to comply with the disclosure obligations by that deadline, he was to pay a fine of $2,500.00 per day for every day thereafter until the disclosure was provided in full. The applicant took the position that the respondent failed to comply with Justice Corbett's order, and brought a motion seeking an order enforcing the payment of the fine to the applicant along with an order staying the respondent's right to continue any questioning pending compliance.

[21] Justice Van Melle heard the applicant's motion and found that the respondent had indeed failed to comply with Justice Corbett's order. Justice Van Melle noted that Justice Corbett's order did not specifically specify to whom the fine was to be payable, but in her view the fine ought to be made payable directly to the applicant. There was no finding of contempt made by either Justice Corbett or Justice Van Melle, but each of them found that the respondent had engaged in "aggressive litigation practices" that drove up the applicant's litigation costs. Justice Van Melle was satisfied that the fine ordered by Justice Corbett ought to be paid directly to the applicant, and ordered the applicant to pay the sum of $185,000.00 (being 74 days which passed from the date of Justice Corbett's order at $2,500.00 per day).

[22] The *Mantella* decision was appealed to the Court of Appeal for Ontario. That appeal was quashed by a decision reported at *Mantella v. Mantella* 2009 ONCA 194 (CanLII). The Court of Appeal for Ontario found that Justice Van Melle's order was not final in nature, and thus leave to appeal to the Divisional Court was required. However, in quashing the appeal, the Court of Appeal for Ontario stated as follows:b

> "The central issue raised in this appeal is whether, absent a finding of contempt, a judge has the jurisdiction under the *Family Law Rules* to impose and order payment of a fine as part of the case management process. In other words, as submitted by the respondent, is the authority conferred by any of Rules 1(8), 14(23) or 19(10) broad enough to allow for the making of such orders? Whether a fine or penalty can be imposed absent a finding of contempt, and to whom the fine is payable, are novel issues and are important. The novelty and importance of the issues do not, however, make the order into a final one for purposes of appeal."

[23] It is trite to state that the most basic obligation in family law is the duty to disclose financial information. As held by the Court of Appeal for Ontario in *Roberts v. Roberts* 2015 ONCA 450 (CanLII), a failure to abide by this fundamental, immediate and ongoing obligation "impedes the progress of the action, causes delay and generally acts to the disadvantage to the opposite party. It also impacts on the administration of justice. Unnecessary judicial time is spent and the final adjudication is stalled. Financial disclosure is automatic. It should not require court orders – let alone three – to obtain production."

[24] In *Manchanda v. Thethi* 2016 ONSC 3776 (CanLII), appealed dismissed 2016 ONCA 909 (CanLII), Justice Myers held as follows:

> "A party should not have to endure order after order after order being ignored and breached by the other side. A refusal to disclose one's financial affairs is not just a mis-step in the pre-trial tactical game that deserves a two minute delay of game penalty. Failure to disclose is a breach of the primary objective. Especially if it involves breach of a court order, a party who fails to disclose evinces a determination that he or she does not want to play by the rules. It is time to oblige such parties by assessing a game misconduct to eject them from the proceeding."

[25] I agree with Justice Myers' comments. The Court has jurisdiction to monitor and police its own case management process. In the circumstances of the case before me, it cannot lie in the respondent's mouth to interpret Rule 1(8) so strictly, while at the same time choosing to consistently not play by the rules (including the *Family Law Rules*). Rule 1(8) permits the Court to make "any order that it considers necessary for a just determination of the matter". The list of options available to the Court under Rule 1(8) is not exhaustive in nature, but inclusive. A just determination of any family proceeding is rooted in the protection of the administration of justice as a whole, and when a party chooses to consistently disobey a court order, the administration of justice itself is called into question.

[26] As Justice Starr held in *Price v. Putman* 2018 ONCJ 86 (CanLII), "as with sentences in civil contempt proceedings, the primary objective of the remedies available under Subrule 1(8) is to coerce the offender into obeying the court judgment or order…general deterrence is the second objective." I agree with Justice Starr that any sanction under Rule 1(8) should be "restorative to the victim of the breach and punitive to the non-compliant party."

[27] Where, as in the case before me, a party commits an ongoing abuse of a central facet of the *Family Law Rules*, a resulting fine or monetary payment does not punish that party as an affront to the Court. Rather, the Court is enforcing its own process by ordering a stake in or cost of the proceeding due to that party's own conduct. Potential incarceration following a finding of contempt may not necessarily result in compliance with disclosure obligations and, as discussed below in my treatment of Issue #3, would typically not contribute much if anything to the advancement or resolution of support or equalization issues.

[28] In my view, the Court has jurisdiction under the *Family Law Rules* to order a fine or monetary payment as part of its role to control and enforce its own process. Such a remedy places a price on non-compliance with court orders and disclosure obligations commensurate with that process. While a remedy of a fine or monetary payment should be reserved to exceptional and/or egregious circumstances, the respondent has been given opportunity after opportunity to comply with his duty to disclose financial information and documentation and I find the case before me to be a fitting example.

[29] Accordingly, the answer to Issue #2 is "Yes".

Issue #3 If the answer to Issue #2 is "Yes", what is the appropriate remedy?

[30] The applicant requests an order compelling the respondent to comply with his outstanding obligations by a specified date, failing which he should pay the applicant a penalty of $500.00 per day for each day of non-compliance. In my view, such a proposal is reasonable. As previously stated, costs orders have been made against the respondent, and while he has complied with those costs orders, their impact has not resulted in compliance with his duty to disclose financial information/documentation.

[31] A daily, monetary penalty payable to the applicant will hopefully have a different impact. The respondent will effectively be in charge of the total amount payable to the applicant, as the monetary penalty will cease to accrue when he finally complies with his duty to disclose.

[32] In addition, should the monetary penalty continue to accrue, the outstanding sum could function as an ongoing credit owing to the applicant for the purpose of the calculation of any potential interim and/or final support and equalization claims. The respondent's decision to bargain with his duty to disclose can now be used, absent compliance, as a potential bargaining chip for the applicant.

[33] In summary,

(a) I find the respondent to be in breach of the terms of Justice Moore's consent order dated March 14, 2019 (as set out in the applicant's Compendium);

(b) I order the respondent to comply with his outstanding obligations by no later than June 30, 2019, and failing compliance with any of his stated obligations, he shall pay a monetary penalty of $500.00 per day for each day of non-compliance to the applicant; and,

(c) in the event the respondent fails to comply with any of the above terms by June 30, 2019, the applicant shall be at liberty to proceed with her motion to strike the respondent's pleadings on five days' notice.

Costs

[34] I would urge the parties to exert the necessary efforts to try and resolve the costs of this motion. If such efforts prove unsuccessful, they may serve and file written costs submissions (totaling no more than five pages including a costs outline) in accordance with the following schedule;

(a) the applicant's costs submissions within 10 business days of the release of this Endorsement; and,

(b) the respondent within 10 business days from the receipt of the applicant's costs submissions.

Diamond J.

Released: May 30, 2019