

COURT OF APPEAL FOR ONTARIO

CITATION: Janjua v. Khan, 2014 ONCA 5

DATE: 20140103

DOCKET: M43220

Lauwers J.A. (In Chambers)

BETWEEN

Khalid Janjua

Moving Party (Appellant)

and

Shahnaz Khan

Respondent

Eli Karp, for the appellant

Brigitta Tseitlin, for the respondent

Heard: December 30, 2013

Motion for an extension of time within which to appeal the decision of Justice Jayne Hughes of the Superior Court of Justice, dated January 7, 2013, reported as 2013 ONSC 44, and for the admission of fresh evidence.

ENDORSEMENT

[1] At the end of a 10 day trial, the trial judge ordered the appellant Ms. Khan to make an equalization payment to the respondent Mr. Janjua in the amount of about \$148,000.

[2] The first issue before the court at trial was whether the Pakistani certificate of divorce relied on by Mr. Janjua in order to obtain his marriage licence in

Ontario was a fake, as claimed by Ms. Khan, who was self-represented at the trial. Hughes J. considered this issue at length and concluded, at paragraph 49:

I find that the respondent, Ms. Khan, has failed to prove, on a balance of probabilities, that the certificate of divorce issued the '16.6.2002' relied on by the applicant, Mr. Janjua, to obtain his marriage licence in Ontario was a fake. I find that the applicant, Mr. Janjua, was legally divorced from his first wife, Nayyar Firdaus, and had the legal capacity to marry the respondent, Ms. Khan, on October 17, 2003; their marriage in Ontario on that date was a valid marriage. As a consequence, Mr. Janjua falls within the definition of "spouse" as set out in subsection 1(1) of the *F.L.A.* and has a legal capacity to make a claim to equalization of the parties' net family properties in these proceedings.

[3] Ms. Khan swore an affidavit dated December 2, 2013 in support of this motion. She characterizes as the Pakistani certificate of divorce as a "pernicious forgery" and alleges that Mr. Janjua "is perpetrating a fraud on me and on this court". Ms. Khan proffers evidence in the fresh evidence motion. One of the documents she tenders is dated "10.12.2012" and is described as an order. In the course of that order, in paragraph 3, the Pakistani court states that Nayyar Firdous is entitled to support payments from Mr. Janjua, for herself and her daughter. The court finds that limitations legislation does not apply: "Since right is continuously accruing to the decree-holders being wife and daughter, the judgment debtor is under a legal obligation to pay such maintenance to the decree-holders until satisfaction of the decree at hand although the same was

filed after nine years of judgment.” This document did not exist at the date of the trial before Hughes J.

[4] Ms. Khan also tenders a document called “Brief of the Case” dated 14-4-2010 purportedly issued by the Chairman of the Arbitration Counsel of Islamabad, which states that a divorce certificate “was never issued by this office, hence this may be treated as bogus”. Mr. Karp was not able to explain why this document was not in Ms. Khan’s hands at the time of trial even though other documents from the Pakistani court clearly were.

[5] Finally, Ms. Khan tenders an order from a Pakistani court dated 22.3.2013 by which: “the petition for withdrawal of an order of warrant of arrest of petitioner/judgment debtor is dismissed.” It appears that Mr. Janjua is subject to arrest for failing to pay what he owes to his first wife. This document was not in existence at the date of the trial of this matter.

[6] Ms. Khan asserts that these documents prove that Mr. Janjua is still married to his first wife and was at the time that he married Ms. Khan civilly in Ontario, therefor invalidating the civil marriage.

[7] Ms. Khan states that she retained Marvin G. Morten to pursue an appeal once these documents were in her hands in April or May 2013. Mr. Morten erroneously brought a motion for leave to appeal and an extension of time to file a notice of appeal in the Superior Court of Justice in Newmarket, rather than in

this court. Mr. Morten subsequently retired from practice and the matter languished until present counsel arrived in November and advanced this motion in November.

[8] Two motions are pending in Superior Court in Newmarket. One motion is brought under rule 59.06(2) of the *Rules of Civil Procedure* to set aside the judgment on the basis of fresh evidence and fraud, and is returnable on February 5, 2013. In addition, Ms. Khan has brought a motion to the Superior Court in Newmarket to stay the enforcement of the judgment until after the motion on February 5, 2013 has been decided.

[9] The respondent relies on the case of *Aristocrat v. Aristocrat* (2004), 73 O.R. (3d) 275 (CA). In that case, a full panel of this court heard a motion to set aside the order of the Chief Justice, who had refused to set aside the order of the Deputy Registrar that dismissed the moving parties' effort to reopen and set aside an order of summary judgment granted by the Superior Court on the basis of newly discovered evidence. The Deputy Registrar had dismissed the motion for failure to file a motion record and factum within the required time. The Chief Justice refused the plaintiff's motion to set aside the order of the Deputy Registrar. Paragraph 9 of that decision provides:

Based upon his oral submissions and his response to questions from the court, it is apparent that Mr. Aristocrat's main concern is to re-open and set aside the original judgment of Métivier J. as a judgment

obtained by fraud. In order to accomplish this, he has moved under rule 59.06(2)(a). The Court of Appeal has no jurisdiction to hear such a motion. Such motions should be brought in the action before a judge of the Superior Court. A similar issue arose in the context of a criminal case in *R. v. Moura*, [2003] O.J. No. 460, 172 C.C.C. (3d) 340 (C.A.). While rule 59.06(2)(a) was not relevant in that case, Morden J.A. held that a motion to set aside an order of the Superior Court, affirmed on appeal, on the basis of newly discovered evidence of fraud should be brought in the Superior Court.

[10] There are superficial distinctions between *Aristocrat* and this case, but the issue for me is whether I should consider which of this court or the Superior Court is the better forum for addressing the fraud issue, in exercising my discretion. The applicant urges me to make the order sought so that she has the benefit of an automatic stay.

[11] In my view, the preferable procedure in these circumstances is to allow the process before the Superior Court to unfold. It would perhaps be especially appropriate for Hughes J. to hear the motion to set aside her judgment on the basis of the fresh evidence. She would be in a superior position to contextualize the fresh evidence and to direct the trial of an issue if so advised.

[12] For these reasons, the motion for leave to appeal and for leave to file fresh evidence is dismissed without prejudice to the moving parties' right to move again for an extension of time to appeal after the disposition of the pending Superior Court motions.

“P. Lauwers J.A.”