

CITATION: Marcoccia v. Marcoccia, 2009 ONCA 162

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COURT OF APPEAL FOR ONTARIO

Rosenberg, MacPherson and Rouleau JJ.A.

BETWEEN

Carmela Marcoccia

Applicant (Respondent in Appeal)

and

Luciano Marcoccia

Respondent (Respondent in Appeal)

Joseph Mariani and York Contracting Ltd.

Appellants (Third Parties)

Douglas J. Spiller, for the appellants

Ken H. Nathens, for the respondent Carmela Marcoccia

Nadine M.L. Waldman for the respondent Luciano Marcoccia

Heard: February 6, 2009

On appeal from the order of Justice Clifford S. Nelson of the Superior Court of Justice dated May 28, 2008.

ENDORSEMENT

[1] The appellants Joseph Mariani and York Contracting Ltd. (YCL) appeal from the order of Nelson J. made under rule 19(11) of the *Family Law Rules*, O. Reg. 439/07 requiring disclosure by the appellants of certain business records.

[2] Carmela and Luciano Marcoccia are in the midst of litigation following the breakdown of their marriage. This litigation has been on-going since 2006 and has been marked by allegations of non-disclosure of financial records. On August 23, 2006, Perkins J. made an order restraining Mr. Marcoccia from depleting his assets. During the marriage, Mr. Marcoccia and Mr. Mariani were each 50 percent owners of YCL. Most, if not all, of Mr. Marcoccia's income was derived from YCL. At some point, Mr. Marcoccia set up a management company York Contracting Services (YCS), which was wholly owned by him and to which management fees were paid by YCL.

[3] Mr. and Mrs. Marcoccia have each retained experts to attempt to determine the value of Mr. Marcoccia's interest in YCL and YCS, and his income for purposes of calculating child and spousal support. Mrs. Marcoccia's expert, Jonathan Hames, has identified a number of problems with Mr. Marcoccia's expert's report. Mr. Hames seeks access to a large number of documents of both YCL and YCS to determine the true financial picture.

[4] On December 19, 2007, McKinnon J. ordered Mr. Marcoccia to provide the disclosure listed in the Hames report. While Mr. Marcoccia made some disclosure, some of the records have still not been disclosed. On February 15, 2008, Mr. Marcoccia sold his 50 percent interest in YCL to Mr. Mariani. Mrs. Marcoccia alleges that this sale was in violation of the non-depletion order made by Perkins J.

[5] On March 5, 2008, Mrs. Marcoccia brought a motion before Boswell J. seeking disclosure of the outstanding records and preservation of the funds received by Mr. Marcoccia from the sale. Boswell J. ordered that Mr. Marcoccia make the disclosure as was ordered by McKinnon J. Mr. Marcoccia asserts that he cannot comply with the order because he no longer has a right of access to YCL documents and Mr. Mariani has refused to provide access. In the result, Mrs. Marcoccia brought a motion under Rule 19 requiring that Mr. Mariani and YCL produce the records. Mr. Marcoccia supported the making of the order.

[6] The appellants resisted the making of the order. They retained their own expert, Mr. Larry Joslin, who agrees that in light of the concerns raised by Mr. Hames, some of the requested records are relevant. The appellants have produced those records. However, Mr. Joslin opines that it is not apparent why the balance of the records are required. He favours an approach of incremental disclosure where third parties are involved. He has analyzed the Hames report and the earlier report from Mr. Marcoccia's

expert and is of the view that no case has been made out for the additional disclosure at this point.

[7] In his affidavit, Mr. Mariani claimed that the documents contained proprietary information about the business and are privileged. That issue was not pressed before the motion judge or in this court.

[8] Rule 19(11) of the *Family Law Rules* provides for the making of an order requiring a non-party to let the party seeking the records examine the documents and to supply the party with a copy at the legal aid rate. The judge may make the order where the document is not protected by a legal privilege and “it would be unfair to a party to go on with the case without the document”.

[9] We agree with the appellants that the trial judge did not apply the proper test. It is apparent from his reasons that he felt bound to order disclosure because McKinnon J. and Boswell J. had been satisfied that the documents were relevant and should be disclosed. In our view, rule 19(11) contemplates that the motion judge must come to an independent determination. The judge must be satisfied by the party seeking access to the documents that it would be unfair to the party to go on with the case without the document. That judges have previously found the documents to be relevant does not necessarily determine that issue, especially where, as here, the non-party was not a party to the proceedings that led to the making of an earlier disclosure order against a party.

[10] That said, we are satisfied that the order was properly made in this case. The material available to the motion judge demonstrates that it would be unfair to Mrs. Marcoccia to require her to proceed with the case without access to the documents. While the order that was made is broad, Mrs. Marcoccia has raised serious issues as to whether her husband has hidden assets and whether he has fully and accurately reported his income in the relevant years. We do not accept the premise underlying the Joslin report that a party in the position of Mrs. Marcoccia is always required to proceed incrementally. Particularly in this case, proceeding incrementally would only serve to delay this already prolonged litigation. The documents sought should resolve the issues raised by Mrs. Marcoccia. The fact that Mr. Marcoccia agrees that the order was properly made provides additional support for the making of the order. He too is obviously convinced of the importance of the disclosure to resolve the serious outstanding issues.

[11] However, in the unusual circumstances of this case, it is our view that appellants are entitled to be reimbursed for their reasonable expenses in complying with the order. The appellants have filed a report from their accountant setting out an estimate of the cost of compiling the records. In our view, Mr. Marcoccia should pay those expenses. He was required by the order of McKinnon J. to make the disclosure and should have done

so before the sale of his interest in YCL. Further, the order of this court allowing an appeal from the striking of his Answer to his wife's claims for support and an equalization payment, orders that he pursue the disclosure required by the order of McKinnon J. and includes a term that he indemnify his wife for any cost orders made against her in this litigation: see *Marcoccia v. Marcoccia*, 2008 ONCA 866, at para. 18.

[12] Accordingly, the appeal is dismissed except that it shall be a term of the order that Mr. Marcoccia shall pay the appellants' reasonable expenses, not to exceed \$7,400, for complying with the order.

[13] The appellants shall pay the costs of Mrs. Marcoccia fixed at \$4,000 inclusive of G.S.T. and disbursements. There will be no order of costs in favour of Mr. Marcoccia.

Signed: "M. Rosenberg J.A."

"J.C. MacPherson J.A."

"Paul Rouleau J.A."