



SUPERIOR COURT OF JUSTICE

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her interest in the two properties is at the core of Mr. Seganfreddo's proceeding and should be dealt with pursuant to the mediation/arbitration agreement entered into by the parties.

Facts

[3] This motion is one of several proceedings in the contentious matrimonial litigation Mr. and Mrs. Seganfreddo have been embroiled in since their separation in 2004. For the purposes of determining the current application, the relevant facts are as follows.

[4] The parties separated in November 2004 after a two-year marriage. Ms. Seganfreddo commenced matrimonial proceedings on December 22, 2004. Mr. Seganfreddo's Answer, dated February 17, 2005, sought, among other things, the equalization of net family property. His Answer specifically references the Athabasca Property. Ms. Seganfreddo amended her Application on January 31, 2006, adding a trust claim in another property held in the name of Mr. Seganfreddo's parents.

[5] On December 12, 2006, Mr. and Mrs. Seganfreddo entered into a consent order in which they agreed that "all issues in this application" be referred to Judith Nicoll for mediation/arbitration. On January 16, 2007, they signed a mediation/arbitration agreement submitting all issues to mediation/arbitration. The agreement contained a provision that the parties agree that neither shall commence any proceedings before any court with respect to the matters dealt with in the agreement, except in case of emergency.

[6] The parties specified the issues referred to the mediator/arbitrator in paragraph 4 of the agreement. The parties placed an x beside the issue described as "all property and equalization issues", indicating that those issues were to be submitted to the mediator/arbitrator. To the list of issues to be submitted, the parties added, in handwriting, the following: "It is acknowledged that either party may be seeking to add third parties to the action." Neither party has sought to add a third party.

[7] A child protection proceeding that began in September 2007 interrupted the mediation/arbitration process. At the conclusion of the child protection trial on September 8, 2009, the trial judge, McGee J. gave an oral decision granting custody of the Seganfreddo's two children to Mr. Seganfreddo. McGee J. delivered written reasons in that matter on November 12, 2009. On February 26, 2010, McGee J. ordered Ms. Seganfreddo to pay Mr. Seganfreddo costs in the amount of \$130,000. The trial and costs decisions are currently under appeal.

[8] On March 2, 2009, Ms. Seganfreddo transferred her interest in the Northcliffe Property to her parents. On November 27, 2009, she transferred her interest in the Athabasca Property to her parents.

[9] Mr. Seganfreddo revived the arbitration proceedings on November 11, 2009 to deal with child support issues. The matter was heard by the arbitrator on December 16, 2009, and on December 21, 2009, the arbitrator made an award requiring Ms. Seganfreddo to, among other things, amend her financial statement to include "the existence of the properties purported to be held in trust for her parents ... and to report any property that has been disposed of within two years preceding the making of the statement." The arbitrator's award indicated that "until

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advised otherwise by counsel, the parties should now proceed on the basis that the equalization issues must be dealt with.”

[10] Mr. Seganfreddo issued his statement of claim in the fraudulent conveyance action on June 21, 2010. On June 23, 2010, he obtained an *ex parte* injunction and certificates of pending litigation with respect to the two properties in question. On November 19, 2010, Ms. Seganfreddo moved before Whitaker J. to set aside the injunction and certificates. That matter is under reserve.

[11] Counsel for Ms. Seganfreddo submits that the ownership of the two properties that form the basis of Mr. Seganfreddo’s claim is based in an issue submitted to the mediator/arbitrator in the parties’ agreement, and thus the present proceedings should be stayed.

[12] Counsel for Mr. Seganfreddo submits that the claims in Mr. Seganfreddo’s proceeding are properly before this court for the following reasons:

1. The claims were not submitted to the arbitrator.
2. The claims arose after the mediation/arbitration agreement was signed.
3. The claims are also against Santo Fiore and Maria Fiore, who are not parties to the mediation/arbitration agreement.
4. The claims include claims for certificates of pending litigation, which can only be issued by the registrar under an order of the court, not the arbitrator.

The Law

[13] The Act limits the court’s involvement in a dispute where the parties have agreed to arbitration. The primacy of the arbitration process over the judicial process is set out in sections 6 and 7 of the Act, which read as follows:

Court intervention limited

6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.
2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
3. To prevent unequal or unfair treatment of parties to arbitration agreements.
4. To enforce awards.

Stay

7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

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Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

[14] Howden J. set out the policy reason behind the primacy of the arbitration process this way: “[its purpose is to encourage parties to resort to arbitration as a method of resolving their disputes in various matters, including family law matters, and to require them to hold to that course once they have agreed to do so.” *Puigbonet-Crawford v. Crawford*, [2007] W.D.F.I. 2387 (Ont. S.C.J.).

[15] Numerous decisions of the Ontario Court of Appeal have laid down the approach the court must take to determining whether to stay a claim pursuant to s. 7(1) of the Act:

The court first interprets the arbitration provision, then analyzes the claims to determine whether they must be decided by an arbitrator under the terms of the agreement, as interpreted by the court. If so, then under s. 7(1), the court is required to stay the action and refer the claims to arbitration subject to the limited exceptions in s. 7(2). : *Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 505 (Ont. C.A.). See also *MDG Kingston Inc. v. MDG Computers Canada Inc.* (2008), 92 O.R. (3d) 4 (Ont. C.A.); *Stone v. Polon* 2006 CarswellOnt 4494 (Ont. C.A.).

[16] The onus of establishing that one of the exceptions set out in s. 7(2) applies is borne by the party asserting the exception: *Puigbonet-Crawford v. Crawford, supra*.

[17] When interpreting an arbitration clause, the court should not make a final determination about its scope. Where it is arguable whether a claim falls within the clause, the matter should be left to the arbitrator: *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (Ont. C.A.); *Bickford v. Forget* 2008 CarswellOnt. 1926 (Ont S.C.J.).

Analysis

[18] The core issue in this case is whether the claims advanced by Mr. Seganfredo fall within the terms of the mediation/arbitration agreement. In my view, a claim related to the ownership of the two properties – the Northcliffe Property and the Athabasca Property – is within the terms of the arbitration agreement between these two parties. The issue submitted to the arbitrator is framed in very broad language – “all property and equalization issues”. To determine the equalization issues, the arbitrator must first determine the ownership of the properties. Ownership of the properties is at the heart of Mr. Seganfredo’s claim.

[19] Mr. Seganfredo’s counsel argues that the parties agreed to mediate/arbitrate only those claims set out in their pleadings. Fraudulent conveyance and improper assignment or preference were not pleaded because the parties did not contemplate them when they agreed to submit to

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mediation/arbitration. In my view, it is not the consent order of December 12, 2006 that governs the matter, but rather the mediation/arbitration agreement signed by the parties.

[20] It is true, as Mr. Seganfredo's counsel submits, that the agreement does not include issues related to fraudulent conveyance, improper assignment or preference, or claims for damages. However, these claims arise directly out of the issues that were submitted to the arbitrator, i.e., all property and equalization issues. In fact, Ms. Seganfredo's interest in these properties was a live issue before the arbitrator, as evidenced by the arbitral award of December 21, 2009 requiring Ms. Seganfredo to amend her financial statement to include "the existence of the properties purported to be held in trust for her parents."

[21] Pattillo J. dealt with a claim for damages in a similar set of circumstances in *Bickford v. Forget, supra*. In that case, the partners of a small law firm parted ways. Their written partnership agreement contained an arbitration clause that contemplated a resolution by arbitration of all disputes between the parties arising from the business and affairs of the law firm. Two of the partners commenced an action against a third partner claiming damages for defamation. Pattillo J. was unable to conclude, given the deficiency of the pleading, that the defamation claim was within the scope of the arbitration clause. Relying on the decision of the Ontario Court of Appeal in *Dalimpex Ltd. v. Janicki, supra*, Pattillo J. nevertheless submitted the claim to arbitration because it was arguable that the claim fell within the arbitration clause.

[22] Mr. Seganfredo further submits that amendments to the *Family Law Act*, R.S.O. 1990, c.F.3 (the "FLA") and to the Act, which came into force after the parties entered into the mediation/arbitration agreement but before Mr. Seganfredo's fraudulent conveyance claim, will render any arbitral award respecting Mr. Seganfredo's claim unenforceable.

[23] The FLA, as amended, includes the following provision:

No agreement in advance of dispute

59.4 A family arbitration agreement and an award made under it are unenforceable unless the family arbitration agreement is entered into after the dispute to be arbitrated has arisen.

[24] It is unnecessary to decide whether s. 59.4 applies retrospectively, because, in my view, the current dispute is a subset of the broader dispute dealing with the division of matrimonial property. The matrimonial property dispute arose before the parties entered into the mediation/arbitration agreement. The situation was similar in the case of *Owers v. Owers*, 2009 ONCA 296. Although the Court of Appeal did not address whether the legislative changes applied retrospectively to the arbitration agreement in question, it did note that the arbitration agreement in question and the court order requiring the parties to submit to arbitration predated the changes to the FLA and the Act. Notwithstanding that, the court ordered the parties to submit to arbitration in accordance with the agreement and held that the arbitrator was bound by the regulations that governed arbitrations at the time he was appointed mediator/arbitrator: *Owers v. Owers, supra*, at paragraph 20.

[25] Mr. Seganfredo's counsel also submits that this proceeding cannot be referred to the mediator/arbitrator because two of the defendants, Santo and Maria Fiore, are not parties to the

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mediation/arbitration agreement. Counsel relies on the decision in *Pirner v. Pirner* (1997), 34 O.R. (3d) 386 (Ont. C.J. (Gen. Div.)), in which Jarvis J. writes at paragraph 16,

... third parties must have notice of any legal proceeding which affects their rights, including an arbitration: arbitration, being a consensual agreement between two or more parties, cannot in general directly affect the rights of a third party.

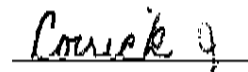
[26] Of course, the mediation/arbitration agreement permits either party to add a third party to the arbitration. Mr. Seganfredo has chosen not to do so. It is reasonable to assume on the basis of the record before me that the parties contemplated adding third parties when they signed the mediation/arbitration agreement. Both parties had interests in properties owned by their parents. Mr. Seganfredo cannot now rely on the fact that Santo and Maria Fiore are not parties to the mediation/arbitration when he has chosen not to add them to it.

[27] Finally, counsel for Mr. Seganfredo submits that this claim should not be submitted to arbitration because it includes a claim for certificates of pending litigation, which can only be issued by the registrar under an order of the court. The relevance of this submission escapes me, given that Mr. Seganfredo obtained certificates of pending litigation from this court on June 23, 2010, a fact that is not set out in Mr. Seganfredo's affidavit, sworn on October 8, 2010, filed in support of this motion, nor in Mr. Seganfredo's factum filed on November 25, 2010.

[28] In summary, I find that Mr. Seganfredo's claims are encompassed in the terms of the mediation/arbitration clause dealing with all property and equalization issues and should thus be submitted to the arbitrator. Ms. Seganfredo's motion is, therefore, allowed, and Mr. Seganfredo's proceeding is stayed.

Costs

[29] If the parties are unable to agree on costs, each party shall make written submissions of no more than five pages each within 14 days of these reasons.



Corrick J.

Released: November 30, 2010

COURT FILE NO.: CV-10-405319

DATE: 20101130

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Gregory Seganfreddo

Plaintiff

- and -

Anna Fiore Seganfreddo, also known as Anna
Fiore, Santo Fiore and Maria Fiore

Defendants

REASONS FOR DECISION

Corrick J.