

**CITATION:** Masci v Masci., 2012 ONSC 1288  
**NEWMARKET COURT FILE NO:** FC-11-039652-00  
**DATE:** 2012-02-24

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Lina Masci, Applicant

**AND:**

Augusto Masci, Respondent

**BEFORE:** McGee J.

**COUNSEL:** Julie Stanchieri, Counsel for the Applicant

Gary Beaulne, Counsel for the Respondent

**HEARD:** February 21 and 22, 2012

**ENDORSEMENT**

**Background**

- [1] This is the return of an emergency motion brought by the applicant without notice to the respondent. The motion is for an extensive preservation order per Rule 12 of the *Family Law Act*. The effect of the order sought would be to remove from the husband's use all equity held within his known assets. Those assets include a jointly owned home, savings, and most importantly, Mr. Masci's OMERs employment pension.
- [2] The motion was first heard February 21. I required the applicant to serve the respondent's counsel. Both parties and their counsel attended February 22. The respondent has filed an affidavit and provided a copy of the disclosure brief that was enroute to the applicant's office the day prior - before he was aware of the applicant's motion.
- [3] The circumstances are easily summarized. The parties are the parents of two adult daughters. Their June 11, 2011 separation ended thirty years of a marriage which has been marked by difficulty and distrust. And although the marriage has ended, the difficulty and distrust has not.
- [4] By the end of November 2011 post separation tensions between the Mascis were escalating. Certain events gave rise to additional sources of mistrust.
- [5] The events relevant to this endorsement centre on Mr. Masci's employment pension. He is 54 years of age and has been employed by the City of Toronto for 31 years. Without

any consultation with Mrs. Masci, he decided to accept a retirement package, effective December 31, 2011. The terms of the retirement package only become clear on February 22, when disclosure was received by applicant's counsel.

### **February 7, 2012**

- [6] The parties continue to reside in the jointly owned home. Mrs. Masci found within Mr. Masci's papers a banking slip which evidenced deposits into his account on February 7, 2012. She provided that slip to her counsel, which with other documents supported her emergency motion without notice.
- [7] It is now known and not disputed that Mr. Masci's OMERs pension has a stated commuted value of approximately \$895,000 of which \$327,331.76 was rolled into a LIRA on February 7, 2012. On the same day, two amounts of \$100,000 each were deposited to GICs in his name.
- [8] Also on February 7, 2012, counsel for Mr. Masci wrote a letter to counsel for Mrs. Masci stating amongst other matters that his client "had not received final information regarding his pension or his severance package." A copy of that letter was also attached to the emergency motion.
- [9] The juxtaposition of these two documents: the banking slip and the letter are the primary basis for Ms. Stanchieri's claim of concealment by the husband.
- [10] There is no suggestion that the husband's counsel, Mr. Beaulne was aware of the transfer of pension funds when he wrote the February 7<sup>th</sup> letter. Although Ms. Stanchieri did not mince words that she viewed Mr. Masci's conduct as one of deliberate concealment, she did not suggest, nor is there any evidence to support a view that his counsel suppressed information.
- [11] I have no evidence before me as to when Mr. Masci became aware of the amounts that were to be transferred, but for his affidavit sworn February 22. Paragraph 16 of that affidavit suggests that he was aware on February 1 that OMERs was deducting income taxes of \$170,364 from a payment of \$567,880.53, for a deposit to him of \$397,516.37.
- [12] I accept Mr. Masci's counsel's statement that he was in the process of making that disclosure voluntarily when he was served with the applicant's motion and that he had no way of knowing that Ms. Stanchieri was preparing an emergency motion.
- [13] At the same time, I accept the applicant's counsel submission that she had been specifically seeking such disclosure since her letter of November 21, 2012.
- [14] Did the husband deliberately delay providing critical information to his former spouse while under an obligation to do so?

### **Wife's Claim of Concealment by the Husband**

- [15] With every month that has passed since learning that her former spouse chose to take a retirement package, Mrs. Masci's anxiety over the pension funds has increased. She and their daughters are dependent on the husband's income. The wife is keenly aware that the pension is the most valuable family asset. There is a history of angry words from the husband, and demonstrated poor financial judgment. Mrs. Masci was reasonably fearful that Mr. Masci would attempt to remove, diminish or dissipate the funds.
- [16] Mr. Masci took no steps to put her concerns to rest. He shared no information around his decision to retire, the consultations and financial planning which lead to his decision to accept the particular package chosen, or the timing of these events. I find that the husband did not make timely disclosure while under an obligation to do so.
- [17] It is most unfortunate that neither counsel was aware, or communicated on the unique nature of commuted pensions: such as the manner in which they can be transitioned out of a plan, how they can be accessed, the requirement for periodic payments, age restrictions, or the resulting tax liability. There is standard and public information applicable to all pensions governed by the *Pension Benefits Act*. It was not so important as to when the monies were transitioned, but rather how the commuted value would be transferred to Mr. Masci. In addition to direct disclosure, information from OMERs circulars, or even the website might well have calmed Mrs. Masci's fears.
- [18] Meanwhile, both counsels were proceeding in the ordinary course. To their mutual credit, it was agreed to request an early case conference date, which was scheduled for the first week of March (within two weeks of this motion).

### **Urgent Motion**

- [19] Was the motion brought February 21 without notice, seeking a refraining order on all the husband's assets, before a case conference, of a sufficient nature to overcome the statutory threshold of Rule 14(4.2)?

#### **NO MOTION BEFORE CASE CONFERENCE ON SUBSTANTIVE ISSUES COMPLETED**

(4) No notice of motion or supporting evidence may be served and no motion may be heard before a conference dealing with the substantive issues in the case has been completed. O. Reg. 89/04, s. 6 (3); O. Reg. 383/11, s. 3 (1).

#### **URGENCY, HARDSHIP ETC.**

(4.2) Subrule (4) does not apply if the court is of the opinion that there is a situation of urgency or hardship or that a case conference is not required for

some other reason in the interest of justice. O. Reg. 202/01, s. 4 (1); O. Reg. 89/04, s. 6 (4).

- [20] I am satisfied that the test for urgency per Rule 14(4.2) is satisfied by the husband's failure to make the process of accepting a retirement package transparent to the wife, and his failure to provide critical information concerning the manner of transfer of an enormously valuable family asset, at a time when he was obligated to do so.
- [21] The order sought by the wife is disproportionate to her available remedies. She remains in possession of the jointly owned matrimonial home, which has equity in the range of \$600,000. It is not appropriate to place her in control of 100% of the joint family assets.
- [22] However, I am satisfied that some of the husband's assets ought to be subject to a refraining order, given the husband's uneven, if not lackadaisical approach to sharing information with the wife. His own affidavit attests to a longstanding discomfort with providing information to the wife. I can appreciate some of the husband's unease, particularly as the parties continue to reside together.
- [23] But in the course of an application before the court, a parties' statutory obligation for disclosure per Rule 13 is a preeminent obligation. There is no place for personal disquiet. Disclosure is required, and it is required in a fulsome and timely manner.
- [24] I am granting the wife some relief: There will be an order in accordance with the wife's Notice of Motion per paragraph 1 (ii)(xi) and (xii) which will preserve the two GIC deposits of \$100,000. I further order that neither party is to encumber the parties' jointly owned matrimonial home municipally known as 274 Barhill Road, Maple, Ontario.

### Costs

- [25] Applicant's counsel seeks costs of \$5,228.63 on a partial recovery basis. She acknowledges that the order was not granted ex-parte and a further reduction may be appropriate for yesterday's attendance. Respondent's counsel seeks an order for no costs. Neither party served an Offer to Settle.
- [26] The applicant is presumptively entitled to costs as the successful party: Rule 24(1) Subrule 4 states that "despite subrule (1), a successful party who has behaved unreasonably during a case may be deprived of all or part of the party's own costs or ordered to pay all or part of the unsuccessful party's costs."
- [27] I invited submissions from counsel on the factors for costs set out in Rule 24(11) and have considered those factors within the context of Rule 24(4).
- [28] My attention is drawn to the atypical step of bringing an emergency motion without notice when there is opposing counsel on record who is active and participatory. Counsel

worked together to secure an early case conference date. Correspondence was answered and telephone calls were returned.

- [29] Applicant's counsel could have called, written, or in the extreme, served a motion, seeking proof as to the disposition of the OMERs funds within a specified timetable; failing which the matter would be put before the court.<sup>1</sup> If she had information not available to the husband's solicitor – such as the bank statement showing deposit of the \$327,331.76 – she could have made that information known to Mr. Beaulne, which would have prompted him into an immediate reply.
- [30] Indeed, with the benefit of hindsight, we now know that Mr. Beaulne was in the process of providing the very information; the absence of which was the fundamental argument for the relief being sought by Ms. Stanchieri. As a result of the failure of counsel to give notice, both of these parties have been put to considerable cost. Mrs. Masci has borne the cost of two court attendances. Mr. Masci's counsel has had to suspend his practise to make reply and appear before the court in under 24 hours.
- [31] While the pre-existing fault is that of the husband, (i.e. not making the OMERs process transparent) the failure of counsel to give notice of this motion is entirely a separate matter, best addressed by costs.
- [32] I decline to award the applicant any costs of her motion.

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1. <sup>1</sup> Although there was some earlier intention on the part of the applicant to bring an emergency motion (the particulars of which were not fully placed before me) it appeared to have centred on claims of support.

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Justice H. McGee

**Date Released:** February 23, 2012