

SUPREME COURT OF NOVA SCOTIA
(Family Division)

Citation: Nwabueze v. Okafor, 2017 NSSC 225

Date: 20170818
Docket: SFHISOS 104260
Registry: Halifax

Between:

Ursula-Pearl Uchenna Nwabueze

Applicant

and

Livinus Obinna Okafor

Respondent

LIBRARY HEADING

Judge: The Honourable Associate Chief Justice Lawrence I. O'Neil

Heard: April 12, 2017 and April 28, 2017 at Halifax, Nova Scotia

Issues:

1. Does a Nova Scotia Court have jurisdiction to order production of income information held by a Nova Scotia employer when the request purportedly originates with a New York Court?
2. Is the answer to question 1 influenced by the fact the subject of the inquiry lives in Saskatchewan? The fact there is a legislative scheme to permit the matter to be addressed in Saskatchewan?
3. Is the answer to the subject question influenced by the fact the disclosure request relates to child support?

Summary: Ms. Nwabueze and the subject children live in the State of New York. The father of the children lives in Saskatchewan. Ms. Nwabueze seeks the income information relating to the father of her children, when he worked as a doctor in Nova Scotia. She is asking this Court to order the Provincial Health Authorities, who paid the Respondent, to produce the information to her and to the New York Court where she has an ongoing child support proceeding.

In support of her request, Ms. Nwabueze filed documents purportedly issued out of the New York Court. She presents one document as a subpoena *duces tecum* and asks that it be registered in Nova Scotia and recognized by this Court.

In subsequent filings, Ms. Nwabueze sought production of the income information pursuant to a Notice of Motion. She based her application on a number of Rules of our Court and the *Inter-Jurisdictional Support Orders Act* and the *Court Jurisdiction and Proceedings Transfer Act*.

Counsel for the Respondent argues the Court does not have jurisdiction to grant the order requested.

Keywords: Subpoena *duces tecum*; child support; production of documents; letters rogatory; letters of request; *forum conveniens*

Legislation: *Inter-Jurisdictional Support Orders Act*, S.N.S. 2002, c.9
Inter-Jurisdictional Support Orders Act, S.S., 2002 Chapter I-10.03
Court Jurisdiction and Proceedings Transfer Act, S.N.S. 2003 c.2
Nova Scotia Evidence Act, R.S.N.S. c.154

Cases Considered: *Hurley v. Zutz*, 2017 NSSC 46
Oticon, Inc. v. Gennum Corporation, [2009] O.J. No. 5498
Armoyan v. Armoyan, 2013 NSCA 99

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Heard: April 12, 2017 and April 28, 2017 in Halifax, Nova Scotia

**Written
Submissions:** May 19, 2017

Written Decision: August 18, 2017

Counsel: Ursula-Pearl Nwabueze, Self-Represented
Christine J. Doucet, Counsel for Livinus Okafor

By the Court:

Introduction

[1] At one time, Ms. Ursula-Pearl Nwabueze and Dr. Livinus Okafor lived together in the State of New York. The parties married in Brooklyn, New York in 2001 and Ms. Nwabueze says they separated in 2004. They have three (3) children together; born in 2002, 2003 and 2004.

[2] The parties have conflicting descriptions of the circumstances that caused Dr. Okafor to discontinue his medical residency in New York. Dr. Okafor says the Applicant essentially sabotaged his immigration status and forced him to return to his native Nigeria. Ms. Ursula-Pearl Nwabueze denies this and says Dr. Okafor acted unilaterally in leaving the hospital in New York where he worked.

[3] In her affidavit filed in this Court on March 14, 2017 Ms. Nwabueze offers that on February 8, 2005 Magistrate Fasone, a Magistrate in the State of New York, ordered Dr. Okafor to pay child support of \$206 per week.

[4] She says the whereabouts of Dr. Okafor were unknown to her for some time thereafter. She says she learned through a google search in 2009 that he was in Nova Scotia and working as a doctor in this Province.

[5] Over the subsequent years, the child support application has been before the New York Court frequently.

[6] Dr. Okafor says he was divorced from Ursula-Pearl Nwabueze by a Nigerian Court on July 24, 2007 and an order of decree absolute issued on March 14, 2016. His 'former' wife says she was unaware of that having happened and she questions the authenticity of documents filed by Dr. Okafor that are offered to support that conclusion. She maintains that they are not divorced.

[7] Post separation, Dr. Okafor returned to Nigeria; gained medical licensure in Canada; practiced medicine in Pictou County, Nova Scotia during the period (2008-2013). In 2013, he moved to Saskatchewan where he currently lives and works. He has re-partnered and has four (4) children with a person he identifies as his current wife. Three of their children were born in Nova Scotia: in February 2010; June 2012 and August 2015. The fourth child was born in Saskatchewan.

Legal History in Nova Scotia

[8] Initially, on February 1, 2017, Ms. Ursula-Pearl Nwabueze filed an *ex-parte* application seeking 'to register and recognize Judicial Subpoena *Duces Tecum*'

from the State of New York and she sought information disclosing Dr. Okafor's income history when he worked in Nova Scotia.

[9] When these documents were first received by this Court, the Court investigated and learned Dr. Okafor was no longer living in Nova Scotia. This was communicated to Ms. Ursula-Pearl Uchenna Nwabueze. She was already aware of Dr. Okafor living in the Province of Saskatchewan.

[10] Ms. Ursula-Pearl Nwabueze then re-filed her request with this Court and again sought evidence of Dr. Okafor's income while working for Nova Scotia Health Authorities.

[11] On March 3, 2017, she filed a Notice of Application directed to the Nova Scotia Health Authority as amended on March 17, 2017 to include the Nova Scotia Department of Health and Wellness. She relies on Rule 14 and other Rules governing procedures in this Court, and the *Inter-Jurisdictional Support Orders Act*, S.N.S. 2002, c. 9 as the basis for her request for this information.

[12] The matter now comes before the Nova Scotia Court pursuant to the amended March 2017 motion of Ursula-Pearl Nwabueze filed March 23, 2017 wherein she seeks:

An order for production of the Respondent's employment and income records held by the Nova Scotia Health Authority and/or Medical Services Insurance (MSI)/Nova Scotia Department of Health & Wellness from his time earning an income in Nova Scotia.

[13] The matter was first before me on April 12 and returned on April 28, 2017.

-April 12, 2017 Appearance

[14] Ms. Christine Doucet appeared on Dr. Okafor's behalf on April 12, 2017 as his counsel. Ms. Doucet disputed the Court's jurisdiction to entertain the motion of Ms. Ursula-Pearl Nwabueze. Ms. Doucet confirmed her client was living and working in Saskatchewan. Ms. Ursula-Pearl Nwabueze participated by telephone. The court encouraged the parties to communicate in an effort to find a solution. They were asked to return on April 28, 2017.

[15] Prior to the follow up appearance on April 28, 2017, Ms. Doucet confirmed her client's view that this Court was without jurisdiction. However, she also confirmed he was prepared to participate in a settlement conference presided over by this Court. Mr. Ursula-Pearl Nwabueze is not prepared to participate in that process.

-April 28, 2017 Appearance

[16] On April 28, 2017 both parties participated in a conference by telephone and Ms. Doucet appeared. The Court identified several Rules of Procedure governing this Court and asked for submissions on whether Ms. Ursula-Pearl Nwabueze may avail herself of them or any other rules to obtain production of Dr. Okafor's income information relevant to the period 2008-2013, a period during which she believes Dr. Okafor was working in Nova Scotia.

Issue

[17] In her affidavit filed with this Court on March 14, 2017, Ms. Ursula-Pearl Nwabueze chronicles the legal history of her child support obligation in the State of New York and her efforts to locate Dr. Okafor and to determine his income since 2008.

[18] She notes that on May 11, 2016 Magistrate Fasone changed the child support order from \$206 per week to \$2,413 per month and she states further that as of March 2, 2017 Dr. Okafor owed \$102,414.23 in child support. I am told the matter was most recently considered by Magistrate Fasone of the New York Court on March 8, 2017. The matter was scheduled to return to the New York Court on June 8, 2017.

[19] Ms. Ursula-Pearl Nwabueze advises that the Magistrate in the State of New York requires the Nova Scotia income information so that he can accurately conclude what Dr. Okafor's child support obligation was over the period 2008-2013. She advises that the Magistrate has income information for Dr. Okafor for the period following his commencement of employment in Saskatchewan in

November 2013. Apparently, the Government of Saskatchewan makes this information publicly available.

[20] It is within the foregoing context that Ms. Ursula-Pearl Nwabueze seeks production of Dr. Okafor's earnings while employed as a doctor in Nova Scotia.

[21] As stated, Ms. Ursula-Pearl Nwabueze submits a judicial subpoena *duces tecum* was issued by New York Magistrate Fasone to the Nova Scotia Health Authority and the Nova Scotia Department of Health and Wellness requiring the release of information as to Dr. Okafor's earnings from these authorities. She seeks the release of this information to her and the Kings County Family Court, State of New York. She says these authorities advise they will release the information if the order is issued out of this court.

[22] She identifies the issue as the registration of a Kings County Family Court judicial subpoena *duces tecum* in a Nova Scotia Court or the conversion of it to a Nova Scotia order of production of documents.

[23] Ms. Ursula-Pearl Nwabueze relies on the *Court Jurisdiction and Proceedings Transfer Act* (CJPTA) as interpreted in *Hurley v. Zutz*, 2017 NSSC 46. She argues there is a real and substantial connection between the Province of Nova Scotia and the facts on which the proceeding against the person is based (s.3(1)(2)(e) and the motion pertains to the enforcement of a judgment of a Court made in or outside the Province (s.3(1)(2)(k)).

[24] In addition to R.14, Ms. Ursula-Pearl Nwabueze relies on R.50.03; R.62.02(c); R.62.17-62.20 and R.81.

[25] She references s.70-72 of the *Nova Scotia Evidence Act* which defines the authority of the Family Division of the Supreme Court to compel a witness in Nova Scotia to produce documents in aid of another judicial body.

[26] In response, Dr. Okafor says he will agree to having these issues considered by a Saskatchewan Court. Regardless, he says this Court has no jurisdiction to grant the relief requested.

[27] The parties were ordered to make written submissions on the jurisdictional issue before this Court on or before May 19, 2017.

[28] In her written submission, Ms. Doucet argues the request should be in the form of Letters Rogatory (also called letters of request) as provided for by sections 70 to 72 of the *Nova Scotia Evidence Act*, R.S.N.S. c.154. She says the subject documents are not in the proper form.

[29] She submits further that even if the request was in the proper form, the subject request should be dismissed after applying the analysis recommended by the Court in *Oticon, Inc. v. Gennum Corporation*, [2009] O.J. No. 5498.

Conclusion

[30] Ms. Nwabueze is self-represented. The Court is mindful of the limitations that often implies when legal proceedings are commenced.

- *The Interjurisdictional Support Orders Act*

[31] The *Interjurisdictional Support Orders Act*, S.N.S. c.9, 2002 outlines a process to effect a support order between reciprocating states when the parties live in different jurisdictions. At section 6 it provides for claims for support to be made by Nova Scotia residents and at section 10 provides for claims against Nova Scotia residents by claimants living in a reciprocating jurisdiction.

[32] Section 10(2) provides as follows:

Where the designated authority knows or believes that the respondent is habitually resident in another reciprocating jurisdiction in Canada, the designated authority shall forward the support application to the appropriate authority in that other reciprocating jurisdiction and shall notify the appropriate authority in the originating reciprocating jurisdiction that it has done so.

[33] I am satisfied that the *Interjurisdictional Support Orders Act* does not confer jurisdiction on this Court to order the production of the requested information

given neither party is a resident of this Province. The Act arguably requires this Court to forward the matter to the appropriate Saskatchewan Court.

- *Rules of Court*

[34] Rule 14 governs disclosure and discovery within the trial of an action or the hearing of an application in the Province. This matter does not fall under either heading in this Province.

[35] Rule 50.03 has no application. I do not have a commissioner in Nova Scotia appointed by a Court outside Nova Scotia.

[36] Rule 62 governs family law matters conducted in the Supreme Court but outside the jurisdiction of the Supreme Court (Family Division). This proceeding is in the Family Division and governed by Rule 59.

[37] Rule 81 provides procedures complementary to those in the *Reciprocal Enforcement Judgments Act*. It does not have application given the documents before me.

- *Court Jurisdiction and Proceedings Transfer Act*

[38] The *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c.2 is not applicable. Section 2 provides as follows:

2 In this Act,

- (a) "person" includes a state;
- (b) "plaintiff" means a person who commences a proceeding and includes a plaintiff by way of counter-claim or third-party claim;
- (c) "proceeding" means an action, suit, cause, matter or originating application and includes a procedure and a preliminary motion;
- (d) "procedure" means a procedural step in a proceeding;
- (e) "state" means

(i) Canada or a province of Canada, and

(ii) a foreign country or a subdivision of a foreign country;

(f) "subject-matter competence" means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence;

(g) "Supreme Court" means the Supreme Court of Nova Scotia;

(h) "territorial competence" means the aspects of a court's jurisdiction that depend on a connection between

(i) the territory or legal system of the state in which the court is established, and

(ii) a party to a proceeding in the court or the facts on which the proceeding is based.

[39] Further, this Court's territorial competence in a proceeding is limited by the factors outlined in section 4 of the same Act. Given that I have concluded the request of Ms. Nwabueze is not a proceeding, I conclude this is not applicable. Should I be mistaken in this finding and as provided by s.12, I find the forums having the better connections to the proceeding are Saskatchewan and New York State. In doing so, I have considered the factors outlined in s.11 which give rise to a presumption of a real and substantial connection and I have considered the discussion of this legislation by our Court of Appeal in *Armoyan v. Armoyan*, 2013 NSCA 99 beginning at paragraph 217.

[40] Sections 11 and 12 provide as follows:

Presumption of real and substantial connection

11 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding

(a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in the Province;

(b) concerns the administration of the estate of a deceased person in relation to

- (i) immovable property of the deceased person in the Province, or
- (ii) movable property anywhere of the deceased person if, at the time of death, the person was ordinarily resident in the Province;

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to

- (i) immovable or movable property in the Province, or
- (ii) movable property anywhere of a deceased person who, at the time of death, was ordinarily resident in the Province;

(d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:

- (i) the trust assets include immovable or movable property in the Province and the relief claimed is only as to that property,
- (ii) that trustee is ordinarily resident in the Province,
- (iii) the administration of the trust is principally carried on in the Province,
- (iv) by the express terms of a trust document, the trust is governed by the law of the Province;

(e) concerns contractual obligations, and

- (i) the contractual obligations, to a substantial extent, were to be performed in the Province,
- (ii) by its express terms, the contract is governed by the law of the Province, or
- (iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
(B) resulted from a solicitation of business in the Province by or on behalf of the seller;

(f) concerns restitutionary obligations that, to a substantial extent, arose in the Province;

(g) concerns a tort committed in the Province;

(h) concerns a business carried on in the Province;

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in the Province, or

(ii) in relation to immovable or movable property in the Province;

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in the Province;

(k) is for enforcement of a judgment of a court made in or outside the Province or an arbitral award made in or outside the Province; or

(l) is for the recovery of taxes or other indebtedness and is brought by Her Majesty in right of the Province or of Canada or by a municipality or other local authority of the Province.

Court may decline territorial competence

12 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;

(b) the law to be applied to issues in the proceeding;

(c) the desirability of avoiding multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole.

- *The Evidence Act*

[41] *The Evidence Act*, R.S.N.S. 1989 c.154 at s.20 provides:

20 Evidence of any proceeding or record whatsoever of, in or before any court in the United Kingdom or the Supreme or Federal Courts of Canada, or any court, or before any justice of the peace, or any coroner, in any province of Canada, or any court in any British colony or possession, or any court of record of the United States of America, or of any state of the United States of America, or of any other foreign country, may be given in any action or proceeding by a certified copy thereof, purporting to be under the seal of such court, or under the hand or seal of such justice or coroner, as the case may be, without any proof of the authenticity of such seal, or of the signature of such justice or coroner, or other proof whatever, and if any such court, justice or coroner has no seal, or so certifies, then by a copy purporting to be certified under the signature of a judge or presiding magistrate of such court, or of such justice or coroner, without any proof of the authenticity of such signature, or other proof whatsoever. R.S., c. 154, s. 20.

[42] I conclude this is not applicable to the subject facts given the Court does not have an action or proceeding before it.

[43] The *Evidence Act* at s.70 provides:

70 Where a court or tribunal of competent jurisdiction in any part of Her Majesty's dominions, or in any foreign country, in some proceeding before it, issues or authorizes a commission or order for obtaining the testimony of some person being within the Province, or the production of papers therein, it shall be lawful for the Supreme Court, or a judge thereof, if satisfied of the authenticity of the commission or order and the propriety of the examination or production, by order to direct the examination of the persons whom it is desired to examine, and the production of papers, when required, in the manner prescribed in the commission or order for examination, or in such other manner, and before such person, and with such notice, as the Court or a judge directs.

[44] Rule 50.03 provides:

Power of judge to compel attendance

50.03 (1) A judge may order a witness to attend before the court, a judge, a referee, or a commissioner and to bring documents or other evidence.

(2) A judge may order a witness in Nova Scotia, or direct the prothonotary to issue a subpoena compelling the witness, to attend before a commissioner in Nova Scotia appointed by a court outside Nova Scotia and authorized under Section 70 of the Evidence Act.

[45] I am satisfied that if presented with a foreign commission or order for the production of papers in Nova Scotia, this may, in the appropriate circumstance, be the basis for an order directing the production of the requested income information of Dr. Okafor in so far as it relates to his earnings while living and working in Nova Scotia.

[46] I do not interpret s.70 as requiring both an examination of a witness and the production of papers. An order for production of papers may stand alone.

[47] Section 70 would permit this Court to order the production of the sought after information.

[48] I am not satisfied there is an order for “the production of papers” out of the State of New York.

[49] As stated, on behalf of Dr. Okafor, Ms. Doucet argues that the request for the subject information must be by commission rogatoire as provided for by section 71 of the *Evidence Act*. She further submits that the subject request does not meet the test, in any case, and offers the decision of Justice Brown in *Otican, Inc. v. Gennum Corporation* [2009] O.J. No. 5498 in support of that conclusion.

[50] Section 71 reads as follows:

71 (1) Where under the Foreign Tribunals Evidence Act, 1856 (England), any civil or commercial matter is pending before a court or tribunal of a foreign country, and it is made to appear to the Supreme Court or a judge thereof by commission rogatoire, or letters of request, or other evidence as hereinafter provided, that such court or tribunal is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the Province, such Court or judge may, on the ex parte application of any person shown to be duly authorized to make the application on behalf of such foreign court or tribunal, and upon production of the commission rogatoire, or letter of request, or of a certificate signed in the manner and certifying to the effect mentioned in Section 2 of the Foreign Tribunals Evidence Act, 1856 (England), or such other evidence as such Court or judge may require, make such order or orders as may be necessary to give effect to the intention of the Act above mentioned, in conformity with Section 1 of the Foreign Tribunals Evidence Act, 1856 (England), and such order shall be in the Form A in the Schedule to this Act.

(2) The examination may be ordered to be taken before any fit and proper person nominated by the person applying, or before such other qualified person as to the said Court or judge may seem fit.

(3) Unless otherwise provided by the order for examination, the examiner before whom the examination is taken, shall, on its completion, forward the same to the Prothonotary of the Supreme Court at Halifax, and on receipt thereof the Prothonotary shall append thereto a certificate in the Form B in the Schedule to this Act with such variation as circumstances may require, duly sealed with the seal of the Supreme Court, and shall forward the depositions, so certified, and the commission rogatoire or letter of request, if any, to the Provincial Secretary for transmission to the foreign court or tribunal requiring the same.

[51] With respect to s.71, a preliminary question is whether the Court has *commission rogatoire* or a letter of request before it. I am not satisfied that I do. The official character of the documents presented to this Court as out of the Court in the State of New York do not appear to be out of that Court in the sense of being a request of that Court.

[52] As stated, the Court received a subpoena *duces tecum* on February 1, 2017, apparently signed by Support Magistrate Fasone although this is not entirely clear given the stamp is incomplete. The subpoena *duces tecum* is directed to the Nova Scotia Health Authority and is out of the Family Court, County of Kings, New York.

[53] The package of information filed by Ms. Nwabueze purportedly includes a copy of the affidavit of service of this subpoena on Dr. Okafor's New York lawyer (exhibit F of the February 1, 2017 filing).

[54] The draft order provided is identified by Ms. Nwabueze as "an order to register and recognize Judicial Subpoena *Duces Tecum*" from the State of New York.

[55] As stated, an amended Notice of Motion was filed March 23, 2017 by Ms. Nwabueze wherein she listed the documents she sought from the Nova Scotia Health Authority and the Nova Scotia Department of Health and Wellness.

Conclusion

[56] Ms. Nwabueze should seek the desired information through the Saskatchewan Court. That Court has authority and jurisdiction to require Dr. Okafor to produce his income information for the period he lived in Nova Scotia. It is the most convenient location for that process to occur.

[57] In addition to the reasons provided earlier in support of this Court's decision to not order the production of the information sought, this Court is influenced by the need to avoid a duplication of judicial proceedings and the unnecessary involvement of multiple jurisdictions in litigation.

[58] The *Interjurisdictional Support Orders Act* is available to both parties.

[59] New York is a reciprocating jurisdiction under the Saskatchewan ISO Act, Chapter I-10.03, the Statutes of Saskatchewan, 2002 as amended and table 1 of the schedule of the Interjurisdictional Support Orders Regulations, Sask. Reg., Chapter I-10.03, Reg. 1 (effective January 31, 2003) as amended by Saskatchewan Regulations 85/2006.

[60] The purpose and effect of this legislation was thoroughly discussed by our Court in *Armoyan v. Armoyan*, 2013 NSCA 99 beginning at paragraph 283.

ACJ