
CANADA / JUDGMENT

Faulks (Re)

2014 BCSC 2098

COURT

Supreme Court of British Columbia

DECIDED

7 November 2014

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2014 BCSC 2098 Faulks (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Faulks (Re),

2014 BCSC 2098

Date: 20141107

Docket: 14-0739

Registry: Victoria

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of

Ronald Kenneth Frank Faulks

Before: Master Bouck

(Registrar in Bankruptcy)

Reasons for Decision

Counsel for the Trustee in Bankruptcy, Hayes McNeill & Partners Ltd.:

W.R. Younie, Q.C.

Appearing on his own behalf:

R.K.F. Faulks

Opposing Creditor:

Kimberley Hill

Place and Date of Hearing:

Victoria, B.C.

October 16, 2014

Place and Date of Decision:

Victoria, B.C.

November 7, 2014

The Application

[1] In its notice of application filed July 31, 2014, the trustee sought the following orders:

1. This Honourable Court determine the claim of Kimberley Hill, an unsecured creditor, in the sum of \$10,783.50.
 2. This Honourable Court direct whether Kimberley Hill may be an inspector in the within bankruptcy; and
 3. The trustee's account and fees, disbursements and taxes for the period June 19, 2012-April 14, 2014 in the sum of \$9,828,00 be approved, and the trustee's remuneration be fixed to April 14, 2014 at \$9,828.00;
 4. The fees disbursements and taxes of Ridgway & Company, solicitors to the trustee, from February 11, 2014-April 30, 2014 in the sum of \$8,198.28 be approved;
- [2] At the conclusion of submissions, I allowed items 1, 3 and 4, and appointed Ms. Hill an inspector of the estate. Given time constraints, I was unable provide any reasons for making the orders. These are those reasons.

Facts

- [3] The evidence before the court was presented by way of affidavits. Both Ms. Hill and Mr. Faulks attempted to elaborate on and add to the affidavit material when making their respective oral submissions. Those elaborations fell into the category of inadmissible hearsay evidence and to some degree irrelevant attacks on the other's character. Given the parties' relationship as described in these reasons, the statements were not surprising. Nevertheless, as explained to the hearing participants, the statements would not be given any consideration in my deliberations.
- [4] The bankrupt is an artist who has fallen into financial difficulties. Ms. Hill was (and possibly still is) the owner and operator of the Mercurio art gallery located in Metchosin, B.C. The gallery was operated as a sole proprietorship when the debt owing by Mr. Faulks was incurred. Ms. Hill says that the bankrupt owes monies related to a contract for the showing or sale of art work.

- [5] Mr. Faulks first sought creditor protection under a consumer proposal. The necessary creditor support was not forthcoming. Thus, on June 20, 2012, Mr. Faulks made a voluntary assignment into bankruptcy. According to one of the trustee's reports, Mr. Faulks removed his works from the Mercurio gallery one day before the bankruptcy assignment and without notice to Ms. Hill.
- [6] The bankruptcy began as a summary administration. Neither Ms. Hill nor her proprietorship was identified as a creditor by the bankrupt.
- [7] Unaware of the assignment, Ms. Hill commenced a proceeding in the Provincial Court of British Columbia under the style of cause Kimberley Hill and Le Nouveau Soleil CA doing business as "Mercurio" v. Ken Faulks, No. C5737, Western Communities Registry.
- [8] Mr. Faulks did not tell his trustee about the action. Indeed, the bankrupt proceeded to file a reply and counterclaim. These steps were taken despite the bankrupt having the protection against the claim by virtue of his assignment.
- [9] On March 21, 2013, Mr. Faulks received his automatic discharge from bankruptcy.
- [10] A trial of the Provincial Court action was heard in October 2013. Mr. Faulks was represented by counsel. The bankruptcy assignment was not raised at trial. The court granted judgment in Ms. Hill's favour in the sum of \$10,712.50 (the "Judgment"). It appears that Mr. Faulks' counterclaim was dismissed.
- [11] A payment hearing on the Judgment followed later that month. The hearing was adjourned until February 2014 on the condition that Mr. Faulks pay \$100 per month towards the Judgment. Mr. Faulks did not make that first \$100 payment. As a result, Ms. Hill took out garnishment proceedings in both British Columbia and Alberta. Some monies were collected as a result of the garnishing orders.
- [12] By November 2013, Ms. Hill became aware of the bankruptcy assignment and was in contact with the trustee. Ms. Hill informed the trustee of the Provincial Court proceedings to that date. The trustee then filed a notice of stay of proceedings in the Provincial Court action.
- [13] On December 6, 2013, Mr. Faulks applied for a stay on the payment order and return of monies collected. The matter came on for hearing before His Honour Judge Blake who was then fully apprised of the bankruptcy assignment. Judge Blake created a helpful memorandum outlining most of the events set out above. In that memorandum, Judge Blake concludes that Ms. Hill is prohibited from taking any further execution proceedings on the payment order. Mr. Faulks' application for payment out of court with respect to funds already paid in to court was adjourned generally with liberty to re-apply after January 31, 2014.
- [14] Judge Blake found Ms. Hill's predicament "to be entirely the result of [Mr. Faulks'] improper manipulation of the bankruptcy system."

- [15] Despite Judge Blake's conclusions, Ms. Hill went back before the Provincial Court on two occasions in March 2014 in an attempt to have the garnishment monies paid out to her. The applications were adjourned generally by order of the court.
- [16] On March 20, 2014, pursuant to an application made by the trustee, Madam Justice Power ordered Mr. Faulks' discharge annulled. Ms. Hill appeared on that application. The bankruptcy filing was then converted by the trustee into an ordinary administration.
- [17] Ms. Hill has now filed an amended proof of claim adding to the Judgment various amounts which are said to relate to the Provincial Court action. The amended proof of claim is in the name of Ms. Hill and Le Nouveau Soleil Creations Ltd. The additional claim includes such things as lawyers' bills, parking charges incurred when meeting with the trustee, a transcript of the proceedings in the Provincial Court and charges relating to the garnishment proceedings. Ms. Hill's claim in the bankruptcy is for the sum of \$18,692.63.
- [18] A first meeting of creditors was held on May 14, 2014. Ms. Hill was given the opportunity to ask questions of the trustee and the bankrupt. A representative of the Superintendent of Bankruptcies was present. Whether any other creditors were in attendance is not clear. At this meeting, Hayes McNeill & Partners were affirmed in their appointment as trustee of the bankrupt's estate. It was also resolved that Ms. Hill be appointed inspector of the estate "subject to confirmation at a Court hearing regarding her eligibility and verification of the amounts of her claim".
- [19] A formal notice denying Ms. Hill's amended proof of claim but allowing a claim in the amount of \$10,783.50 was issued by the trustee on June 2, 2014.
- [20] On June 30, 2014, the trustee issued its self-described interim bill for fees for the period June 19, 2012 to April 14, 2014.
- [21] The trustee retained Ridgway and Co. in or about February 2014. The purpose of the retainer was to advise the trustee on several issues but in particular with respect to the discharge annulment application and the amended claim of Ms. Hill and her now incorporated business. Ridgway and Co.'s retainer also included attendance at Provincial Court to speak to the payment out applications.
- [22] Various entries in these two bills detail meetings with or communications to and from Ms. Hill.
- [23] At the hearing before me, Ms. Hill opposed the approval of the two bills on the basis that a further hearing might be held to question and challenge the trustee and the solicitors on their accounts. Ms. Hill submitted that "other creditors" should be given the opportunity to assist her in mounting these challenges. No specific individuals or entities were identified.

Discussion

[24] Both Ms. Hill and Mr. Younie referred to various provisions of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") and General Rules. Where the parties' positions differ is on the interpretation and application of some of these provisions.

A. Determining the claim of Kimberley Hill

- [25] Pursuant to s. 135 (2) of the BIA, the trustee may disallow, in whole or in part, any claim. If the claim is disallowed in whole or in part, the trustee must give reasons. In its notice to Ms. Hill, the reasons are stated as "includes post-bankruptcy Small Claims Court costs". A disallowance is final, subject to the creditor appealing the trustee's decision. In this case, the trustee sought directions on the amended proof of claim instead of requiring Ms. Hill to appeal the determination: s. 34 of the BIA.
- [26] As already described, Ms. Hill's additional claims are indeed out of pocket expenses relating to the Provincial Court action and include expenses for enforcement remedies. As I understood the submissions, Ms. Hill says that such "costs" can be included in the claim by virtue of s. 121 (1) of the BIA which provides:
121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
- [27] The difficulty with Ms. Hill's position is that she has no enforceable claim for costs against the bankrupt. To be provable, a claim must be recoverable by legal process: *Farm Credit Corp. v. Hollowach (Trustee of)*, 68 C.B.R. (N.S.) 255 (Alta C.A.), (leave to appeal to Supreme Court of Canada dismissed). The Judgment does not include an award of costs. Section 19 (4) of the Small Claims Act, R.S.B.C. 1996, c. 40 specifically precludes the award of counsel or solicitor's fees to another party in the proceeding. Ms. Hill says that she arrived at her position after conducting some legal research. No case authorities were provided to the court. While I accept that Ms. Hill has put some good monies after bad in obtaining and then attempting to collect on the Judgment, the simple incurring of these expenses does not make them provable claims under the BIA.
- [28] Thus, the trustee's determination of the amount of Ms. Hill's provable claim is correct at law.

B. Appointment of Ms. Hill as Inspector

- [29] The appointment, powers and duties of an inspector are set out in ss. 116 to 120 of the BIA. An inspector is in a fiduciary position and must perform his or her duties impartially: *Re Bryant Isard & Co.* (1923), 4 C.B.R. 41 (Ont S.C.) at p. 48. That does not mean that the inspector and trustee must always be in agreement. Indeed, the inspector's duties are owed to the creditors and instructions to the trustee should be in the best interests of all of the creditors and the estate.
- [30] In my view, the trustee was justified in making Ms. Hill's appointment subject to the resolution of her provable claim. Until that issue was resolved, Ms. Hill's interests would be in conflict with those of her fellow creditors. With that issue resolved, Ms. Hill is appropriately appointed an inspector to the estate. Mr. Faulks' objection to the appointment was based on the personal friction between himself and Ms. Hill. That friction is not grounds for denying Ms. Hill's appointment.

C. Fixing of the trustee's interim bill and legal fees

- [31] The previously unresolved question of Ms. Hill's claim also made the taxation or "approval" of these bills problematic. To some degree, Ms. Hill's dealings with the trustee put her in a conflict situation with other creditors and their share in any estate dividends. Those dealings resulted in the trustee retaining counsel and taking additional steps itself which would not typically be required in a bankruptcy administration. Of course, Mr. Faulks' actions were largely the cause of counsel's involvement.
- [32] Ms. Hill wished to add this proviso to the order sought:
- with respect to the trustee's bills "in principle subject to a review of the trustee's request by, or on behalf of, the creditors, as provided for in the Bankruptcy and Insolvency Act (BIA), with final approval for payment being based on results that confirm fair value for cost and in compliance with the regulations governing remuneration to trustees as contained in the BIA";
 - with respect to the solicitor's bill "after appropriate review by the creditors and/or inspector(s) that confirms fair value for cost and compliance with regulation contained in the BIA".
- [33] However, Ms. Hill had no specific objections to the bills.
- [34] I acknowledge that the method of bringing these bills before the court for approval and "fixing" of fees is not in compliance with the BIA. There is no indication that the trustee's fees are 7.5% (or more) of the realization of the bankrupt's property. Nor is there any indication that the Superintendent or any other creditors received notice of this hearing or had an opportunity to comment on the trustee's bill. The result in this case should not stand as any precedent for ignoring the processes stipulated under the BIA. What the circumstances of this case called for is a timely administration of the estate.

- [35] Nonetheless, based on the affidavit material, I was satisfied that the trustee's claim for compensation was proper for the supervision, safekeeping, responsibility and care, pain, time and trouble connected with the administration of the estate: *Re Bryant Isard & Co.*, supra; see also *Rico Enterprises Ltd. (Re)* (1994), 30 C.B.R. (3d) 62 (B.C.S.C.).
- [36] I was also satisfied on the evidence that the amount claimed in the legal bill was justified based on the factors set out in *Re Hess* (1977), 23 (N.S.) 215 (Ont. S.C.); see also *PriceWaterhouseCoopers Inc. v. CIT Financial Ltd.*, 2005 BCSC 1411 at para. 19, rev'd on other grounds 2006 BCCA 214.
- [37] In making my order, consideration was given to the fact that an actual taxation of the fees can still occur: BIA, s. 152 (6); *Rico Enterprises Ltd. (Re)* at para. 30; *Venables v. Royal Bank* (1981), 41 C.B.R. (N.S.) 165 (B.C.C.A.); *Re Thompson* (1991), 4 C.B.R. (3d) 109 (N.S.T.D). There is no order made that these bills be paid at this time. The BIA contemplates a two-stage process of summary approval but with the potential for further scrutiny of trustee fees and legal bills once the trustee's final statement of receipts and disbursements is issued.
- [38] The position taken by both the trustee and the creditor Ms. Hill created a stalemate in the administration of the estate. The orders made on October 16, 2014 were intended to end that stalemate.

"C.P. Bouck"

Master C.P. Bouck

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Prepared on 28 October 2026 · Esheria