

CANADA / JUDGMENT

Faulks (Re)

2017 BCSC 2204

COURT

Supreme Court of British Columbia

DECIDED

1 December 2017

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2017 BCSC 2204 Faulks (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Faulks (Re),

2017 BCSC 2204

Date: 20171201

Docket: S140739

Registry: Victoria

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of

Ronald Kenneth Frank Faulks

Before: Master Bouck

Reasons for Judgment

Counsel for the Bankrupt:

D.S. Mulroney

Counsel for the Trustee in Bankruptcy:

W. Younie, Q.C.

Inspector/Opposing Creditor:

K. Hill

Place and Date of Hearing:

Victoria, B.C.

October 31, 2017

Place and Date of Judgment:

Victoria, B.C.

December 1, 2017

Introduction

- [1] This is a trustee-initiated application for an order that Mr. Faulks be discharged from his bankruptcy. Both the trustee and the Inspector/creditor ask the court to impose conditions to that discharge. Mr. Faulks submits that he is not blameworthy with respect to any aspect of his bankruptcy and seeks an absolute discharge.

Facts

- [2] Ronald Faulks is 53 years old, single and earns his living as a self-employed artist.
- [3] On June 20, 2012, Mr. Faulks was assigned into bankruptcy. The causes of the bankruptcy are stated to be a relationship breakdown, sporadic income from self-employment and overextension of credit. At the time of his assignment, Mr. Faulks reported assets of \$5,970 and liabilities of \$24,061.29. Absent from the bankrupt's statement of affairs is any mention of either unsold artwork inventory or a debt that might be owed by him to the opposing creditor or her company. Further, the statement of affairs fails to disclose that Mr. Faulks operated a business.
- [4] There is no sworn evidence from the trustee. However, by way of submissions, the trustee intimates that his office was initially unaware of the nature of Mr. Faulks' business dealings. Mr. Faulks says that he disclosed the nature of his remunerative work to the trustee and, in particular, the fact that he sold much of his artwork on commission contracts with certain galleries. Indeed, in the early stages of the bankruptcy, Mr. Faulks invited members of the trustee's office to some of his gallery showings. According to Mr. Faulks, no one at the trustee's office inquired about the value of any unsold art inventory or advised him of any obligation to report such values on his statement of affairs or otherwise.
- [5] Just prior to the assignment, some of Mr. Faulks' artwork was being displayed for a commission sale with a gallery owned by Ms. Hill's company. According to a report of the trustee, Mr. Faulks removed the artwork, without Ms. Hill's consent, one day prior to the bankruptcy assignment. Mr. Faulks acknowledges the removal of the artwork but says that the step was justified as Ms. Hill had chosen to move her gallery from downtown Victoria to the more remote Metchosin area and thus violated the terms of their longstanding contract. The removal of the artwork led to a small claims action being brought by Ms. Hill's company against the bankrupt. Mr. Faulks failed to disclose the existence of this action to the trustee, including the fact that he filed a counterclaim against Ms. Hill.

- [6] In March 2013, Mr. Faulks received his automatic discharge from bankruptcy. The trustee's section 170 report[1] prepared at that time indicates that Mr. Faulks was not required to pay any surplus income during the bankruptcy term and that neither the trustee nor any creditors intended to oppose a discharge.
- [7] The small claims action proceeded to trial in October 2013. Ms. Hill's company obtained a judgment against Mr. Faulks in the sum of \$10,712.50. Mr. Faulks' counterclaim appears to have been dismissed. Execution proceedings followed, with Ms. Hill eventually becoming aware of the bankruptcy assignment. More details about the small claims suit and the dealings between Ms. Hill, her company, the bankrupt and the trustee are described in reasons for decision issued earlier in this proceeding: 2014 BCSC 2098. Those reasons describe how Ms. Hill and her company came to be a proven creditor and how Ms. Hill herself was appointed the Inspector in this estate.
- [8] It appears that Ms. Hill's complaints to the Office of the Superintendent of Bankruptcy resulted in the trustee making application for the annulment of the March 2013 discharge order. The discharge was annulled by an order of the court made March 20, 2014. Mr. Faulks did not oppose the annulment order but denied to the court that he acted in any dishonest manner with respect to bankruptcy assignment.
- [9] Mr. Faulks was examined by the official receiver on July 26, 2016. The official receiver's report states that while Mr. Faulks continued to create and sell artwork through various galleries and on the internet after becoming bankrupt, he was not made aware of how the trustee would treat this artwork in the bankruptcy term until March 2014 when the annulment order was obtained. The official receiver nonetheless concluded that the bankrupt's discharge ought to be refused, suspended or granted conditionally due to facts proven pursuant to sections 173(1) (a), (b) and (o) of the BIA.
- [10] During the course of the bankruptcy, Mr. Faulks continued to create and consign his artwork. The monthly income and expense statements provided to the trustee disclose the income received from the sale of that artwork. Following the annulment of the discharge order, the trustee took steps to value and liquidate Mr. Faulks' artwork inventory. Some of the inventory was sold through local auction houses. The estate received \$17,906 from these sales. The auction sale prices for Mr. Faulks' pieces were considerably lower than the gallery prices and averaged about \$85.00 per piece of work.
- [11] Presently, Mr. Faulks has artwork being displayed on commission valued at \$79,020.00. Some of that artwork is being displayed for sale in a gallery in Edmonton, Alberta.
- [12] In addition, the trustee garnisheed funds owing to the bankrupt upon the sale of some artwork. The sum of \$3,835.25 was recovered and applied to the trustee's fees.
- [13] Mr. Faulks has purchased a new computer during the bankruptcy term. The trustee concedes that such equipment could be considered tools of the trade and thus exempt from realization.

- [14] The bankrupt's income has never necessitated the payment of surplus income into the estate.
- [15] The claim of Ms. Hill and her company represents 32% of the unsecured claims proven in the bankruptcy. The bankrupt's largest creditor is RBC Royal Group representing 64% of the proven claims.
- [16] No dividends have been paid to the creditors. According to the August 2017 interim statement of receipts and disbursements, the monies received into the estate have largely gone to pay trustee and legal fees. The remaining funds of \$2,996.50 might be available to the creditors but there will likely be additional trustee and/or legal fees associated with this application. The trustee and legal fees are, of course, subject to a final taxation.

Discussion

- [17] The guidelines and principles to be considered on this application are thoroughly canvassed in the authority cited by the trustee: Bowen (Re), 2015 BCSC 502 at paras. 31-34. The starting point is to determine whether a s. 173 fact has been proven by either the trustee or the opposing creditor.
- [18] The trustee has not filed an updated s. 170 report but appears to instead rely on the objections to the discharge as raised by the official receiver. The thrust of the trustee's position is that Mr. Faulks knowingly failed to disclose the art inventory on his statement of affairs and failed to report the further accumulation of artwork inventory during the course of the bankruptcy. The trustee characterizes this conduct as a failure by the bankrupt to perform his duties and continuing to trade after becoming aware of being insolvent: ss. 173(1) (c) and (o).
- [19] Based on the evidence presented, I am not satisfied that either of those s. 173 facts have been proven on the bases submitted by the trustee.[2] The evidence indicates that the trustee had full knowledge of how Mr. Faulks earned his living from the outset of the bankruptcy assignment. While the bankrupt should have been more careful in reviewing his statement of affairs for accuracy, I am not satisfied that the omission of any reference to either inventory as assets or to the operation of a business was deliberate or blameworthy. Furthermore, given how Mr. Faulks earns his living, it is difficult to conceive how the bankrupt could be expected to deliver his artwork inventory to the trustee for liquidation by auction and still receive an income that would meet his basic living expenses. The bankrupt's income from artwork sales has not resulted in surplus income for the estate over the course of several years. The average annual income earned by Mr. Faulks during a five year contractual arrangement with Ms. Hill and her company was just under \$16,000. There is no evidence to suggest that the bankrupt's conduct with respect to the artwork sales benefitted him to the detriment of his creditors.

- [20] I am also not persuaded that the bankrupt is a "trader" as contemplated by s. 173(1) (o) as he is not a merchant buying and then selling goods for an expected profit: *Breti (Re)* (1999), 14 C.B.R. (4th) 35 (Sask. Q.B.).
- [21] Nevertheless, I find that the bankrupt's failure to disclose to the trustee his dealings with Ms. Hill and her company was blameworthy. By failing to disclose those dealings, the bankrupt did not comply with his duties and, thus, a fact is proven under s. 173(1) (o).
- [22] With this finding, the next question to be determined is whether the bankrupt's discharge should be suspended or made subject to conditions or a combination of both consequences: s. 172. The bankrupt's conduct does not meet the high threshold of misconduct justifying a refusal of the discharge. Despite the request made by Ms. Hill, there is no evidentiary or legal foundation to order that the bankruptcy assignment be annulled.
- [23] In fashioning an appropriate discharge order, the bankruptcy court endeavours to balance the interests of the creditors in being paid, the interest of the rehabilitation of the bankrupt, and the integrity of the bankruptcy process and the public's perception of it: *Bury (Re)* (2007), 34 C.B.R. (5th) 263 as cited in *Bowen (Re)*. No order except for one that results in the full payment of her claim will be satisfactory to Ms. Hill. The BIA simply does not permit a discharge order that prefers one unsecured creditor over another; the only way that Ms. Hill's claim would be paid in full is if there were sufficient monies in the estate to meet all of the unsecured creditors' claims.
- [24] In order to bring more monies into the estate, the trustee proposes that the bankrupt pay the estate the value of the artwork inventory, with that value to be determined either by the registrar in these reasons or by the ongoing trustee-monitored sales of the artwork.
- [25] It has already been determined that Mr. Faulks' only source of income is from the sale of his artwork. Again, to allow the trustee to simply liquidate that artwork at auction sales would leave next to nothing for Mr. Faulks to live on. Moreover, to allow the administration of this estate to continue until all of the existing inventory is sold would result in further trustee fees and, based on Mr. Faulks' historical income, likely little or no monies available for the benefit of creditors.
- [26] Mr. Faulks has now been in bankruptcy for a total period of 53 months, a far longer term than experienced by most first time assigners. He has complied with most of his duties, including the provision of monthly income and expense statements. There is no evidence to suggest that Mr. Faulks is living extravagantly or hiding assets or that he will receive some financial windfall upon discharge.
- [27] Curiously, Mr. Faulks took no initiative to obtain his discharge and may well have been content to remain in bankruptcy but for the trustee bringing this matter before the court for determination. Nevertheless, Mr. Faulks does now wish to be discharged, but without any conditions attached.

[28] Considering all of the circumstances of this bankruptcy, I find that the appropriate order is to suspend the discharge until March 1, 2018. While admittedly speculative, it is possible that December sales of Mr. Faulks' artwork will result in an above average income and thus some surplus monies payable to the estate for the benefit of creditors. Until March 1, 2018, Mr. Faulks remains obligated to perform all duties required of an undischarged bankrupt including the provision of monthly income and expense statements to the trustee and the payment of surplus income as determined by the trustee.

"C.P. Bouck"

Master C.P. Bouck

- [1] Filed pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA").
- [2] The onus of disproving the fact rests on the bankrupt when the trustee has raised the objection in the s. 170 report. The only s. 170 report presented on this application recommends an absolute discharge.

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