

CANADA / JUDGMENT

Summit Leasing Corporation v. Ali

2022 BCSC 1429

COURT

Supreme Court of British Columbia

DECIDED

18 August 2022

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2022 BCSC 1429 Summit Leasing Corporation v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Summit Leasing Corporation v. Ali,

2022 BCSC 1429

Date: 20220818

Docket: S211233

Registry: Vancouver

Between:

Summit Leasing Corporation

Applicant

And

Rahimat Rustam Ali

Respondent

Before: The Honourable Justice Branch

Reasons for Judgment

Appearing as Representative for the Applicant:

A. Mackenzie

Counsel for the Respondent:

C. Reedman

Place and Date of Hearing:

Vancouver, B.C.

June 1, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 18, 2022

I. OVERVIEW

- [1] The applicant, Summit Leasing Corporation ("Summit"), seeks a declaration that the debt owing to it by the respondent, Rahimat Rustam Ali, pursuant to a default judgment entered on April 28, 2021 in the amount of \$51,035.91 (the "Judgment"), survives the respondent's discharge from bankruptcy. The application is brought pursuant to ss. 66.28(2.1) and 178(1) (e) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

II. BACKGROUND

- [2] Mr. Ali has worked as a truck driver since 2003. In September 2016, he was involved in a motor vehicle accident. He worked for various companies thereafter but found that he was unable to keep up with the workload due to his injuries. As financial pressures mounted thereafter, he sold his company and his truck. He used the proceeds to pay off certain debts owing to Summit, a financing company. He also started to slowly sell off some classic cars he had collected.
- [3] Summit and Mr. Ali had a business relationship prior to entering the 2020 vehicle lease that is the subject matter of the Judgment (the "Lease"). Mr. Ali states that he had occasionally fell into arrears with Summit, but he was always allowed to catch up.
- [4] At the time he entered into the Lease, Mr. Ali was not employed. However, Mr. Ali deposes that he was in the process of entering into an arrangement for contract work from an individual named Brian (the "Venture"). He says he entered the Lease for the specific purpose of supporting the Venture. There were text messages put in evidence between Mr. Ali and Brian. Although both casual and cryptic, I agree that they do show that Brian was purporting to make efforts to provide Mr. Ali with work.
- [5] Mr. Ali says he had researched the proposed Venture and then called Summit's representative, Allan McKenzie, and "explained the situation to him". Mr. McKenzie subsequently agreed to enter into the Lease.
- [6] For his part, Mr. McKenzie agrees that there was a meeting between Mr. Ali and himself at a White Spot restaurant to execute the Lease sometime after March 2020, but says he has no recollection of discussing the Venture. He deposes, somewhat ambiguously, that he has "no recollection of discussing a business relationship with [Mr. Ali] regarding a person called

[Brian]. If the respondent did mention his business intentions in the restaurant, the purpose of our meeting was to sign the already approved Lease Agreement based on our previous dealings" (emphasis added). Mr. McKenzie asserts that Mr. Ali told him that he would "make the payments and won't let you down."

- [7] The Lease was a "lease-to-own" agreement for a Freightliner vehicle.[1] Pursuant to the terms of the Lease, it was agreed that Mr. Ali was responsible for 48 monthly payments of \$1,672.53, commencing August 1, 2020.
- [8] On April 6, 2020, Summit sought to have Mr. Ali complete a fresh credit application, but Mr. Ali never executed same.
- [9] Mr. Ali never made any payments to Summit pursuant to the Lease. Mr. Ali says that Brian failed to make payments to him for his first two hauls, and so he had to abandon the Venture. Mr. Ali did pay insurance on the vehicle for six months.
- [10] On February 3, 2021, Summit filed the within claim. The claim does not allege fraud or fraudulent misrepresentation by Mr. Ali.
- [11] The applicant obtained a default judgment against the respondent on April 28, 2021.
- [12] On June 18, 2021, Mr. Ali filed a consumer proposal in respect of a proposed bankruptcy (the "Proposal"). He swore that he owed approximately \$70,000 to various third parties other than Summit. Summit notes that there was no mention of any used car sales business in Mr. Ali's Proposal. Summit suggests that this failure to disclose all his business activities reflects poorly on Mr. Ali's credibility. Mr. Ali responds that he never had such a "business", but that he simply worked on old cars as a hobby.
- [13] On December 14, 2021, Mr. Ali's consumer proposal was fully complete and the Administrator issued a Certificate of Full Performance.

II. ANALYSIS

A. The Legal Test

- [14] The relevant statutory provisions allow the court to keep certain debts alive if they were obtained pursuant to false pretences or fraudulent misrepresentations. In *Cruise Connections Canada v. Szeto*, 2015 BCCA 363, the BC Court of Appeal explained the applicable test on such an application:
- [13] The essential test for both "false pretences" and "fraudulent misrepresentation" under s. 178(1)I has been described simply as determining whether the bankrupt was "deceitful" in obtaining the property
- [14] The purpose of s. 178 was considered by Blair J. (ad hoc, as he then was) in *Simone v. Daley* (1999), 170 D.L.R. (4th) 215, 43 O.R. (3d) 511 (C.A.), where he observed the following:

- [27] An important purpose of bankruptcy legislation is to encourage the rehabilitation of an honest but unfortunate debtor, and to permit his or her re-integration into society - subject to reasonable conditions - by obtaining a discharge from the continued burden of crushing financial obligations which cannot be met . . .
- [28] Debts which survive a bankruptcy as a result of the provisions of subsection 178(1), therefore, are exceptions to the overriding principle, and should be addressed accordingly.
- [29] An analysis of the provisions of subsection 178(1) shows that the types of debt which survive a bankruptcy may be divided into four overall categories, namely,
- (1) those which have been imposed by a court in the form of a fine or some other penalty for an offence against the state (paragraph (a));
 - (2) those which reflect the legislative policy decision to protect spouses and children requiring support (paragraphs (b) and (c));
 - (3) those arising out of acts of fraud, dishonesty, or misconduct while acting in a fiduciary capacity (paragraphs (d) and (e)); and finally,
 - (4) those which, if discharged, would undermine the integrity of the bankruptcy process itself (paragraph (f)).
- [30] In *Jerrard v. Peacock* [(1985), 57 C.B.R. (N.S.) 54 (Alta. Q.B.)], Master Funduk--an experienced official in matters of this nature--subjected section 178 to the following analysis, which in my opinion is an accurate one. At pp. 62-63 he said:

[]

Paragraphs (d) and (e) are morality concepts which look at conduct. These kinds of conduct are unacceptable to society and a bankrupt will not be rewarded for such conduct by a release of liability.

[Emphasis added.]

- [15] An order pursuant to s 178(1)(e) is therefore a moral sanction against the bankrupt for obtaining property through deceitful means. It ensures that a deceitful wrongdoer will not be able to use the court system and the state's bankruptcy provisions as a mechanism for avoiding the consequence of his or her actions.

[Italic emphasis in original; underlined emphasis added.]

- [15] More recently, in *Poonian (Re)*, 2021 BCSC 555, aff'd 2021 BCCA 417, the Court of Appeal further discussed the purpose of the test and the onus underlying it:

- [66] The intention of Parliament in enacting s 178 is to prevent a bankrupt from using the statutorily-bestowed shield of bankruptcy to avoid the payment of debts arising from intentionally bad conduct.

[67] Courts accordingly "take a purposive approach to interpreting s. 178(1)(d) and (e) to ensure that debtors do not benefit from their dishonesty". []

[68] The creditor seeking to have the debt or liability survive the discharge bears the onus of establishing that one of the provisions of s 178(1) apply.

[]

[105] As set out above, the essence of s 178(1)(e) is obtaining property through deceitful conduct. In this, deceit has a wide scope, consistent with the overarching principle of s 178(1)(e), that a bankrupt who has profited from morally objectionable actions should not be shielded by discharge.

[106] Accordingly, in order to establish "false pretenses" under this section, the behaviour need not satisfy the Criminal Code definition.

[107] Similarly, in order to establish fraudulent misrepresentation under this section, the behaviour need not satisfy the test for the tort of deceit

[Citations omitted.]

[16] Finally, in *H.Y. Louie Co. Limited v. Bowick*, 2015 BCCA 256 at para. 49 [H.Y. Louie], the court quoted the analysis in *Szeto (Re)*, 2014 BCSC 1563, with approval:

[37] For the purposes of s. 178(1)(e), a fraudulent misrepresentation requires proof that the bankrupt made a representation; the representation was false; the representation was made knowingly, without belief in its truth, or with reckless indifference to whether it was true or false; and the creditor relied upon the representation in turning over the property: *Merenick* at para. 30.

[38] The Criminal Code, R.S.C. 1995 c. C-46, defines a false pretence as follows:

A false pretence is a representation of a matter of fact, either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.

[39] That definition has been adopted for the purposes of s. 178(1)(e): *Celanese Canada Inc. v. Murray Demolition Corp.*, [2010] O.J. No. 6347 at para. 22 (Ont. S.C.).

[40] The core content of both "false pretences" and "fraudulent misrepresentation" is the making of a deceitful statement: *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.*, [1999] O.J. No. 2807 at para. 14 (Ont. C.A.). Both a "fraudulent misrepresentation" and a "false pretence" may be made verbally, or by the non-disclosure of material facts through "blameworthy (or cunning or strategic) silence": *Garofoli v. Kohm*, [1989] M.J. No. 528 at p. 8 (Man. QB); *Merenick* at para. 31.

[41] Although the concepts of false pretences and fraudulent misrepresentation are very similar, they are not identical. A creditor need not show that it relied on a representation made to it by the bankrupt in order to establish that the bankrupt obtained its property by false pretences. In *St. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52 at paras. 104-107, the Court held that a bankrupt who falsely held out to a cattle transport driver and the auctioneer the cattle were his to sell, and that he was entitled to the proceeds of sale, had made representations to third parties that deprived the creditor of property to which it was entitled. The bankrupt, by making something that was not the case appear to be true, had obtained property by false pretences.

[Emphasis added.]

B. Application of the Test

[17] Looking at the test as expressed in *Cruise Connections Canada*, was Mr. Ali "deceitful"? In *Cruise Connections Canada*, the court reached the conclusion that there was deceit based on the following factual findings by the trial court:

[36] In the reasons for judgment in the Original Action, the judge made the following additional findings of fact:

[216] The defendant cruise booking specialists used client information from WinCruise, including the reports listing cruise bookings for which customers had paid deposits, in order to contact the plaintiff's customers and facilitate the transfer of their business to Vision 2000. By doing so, they used confidential information of the plaintiff for a prohibited purpose, contrary to the confidentiality term of their contractor agreements.

[217] None of the defendants . . . sought or obtained the permission of the plaintiff before taking and using the plaintiff's WinCruise client information.

[218] The defendants Marcus and Stover, in breach of their duties of good faith, each made false entries in WinCruise concerning the reasons why customers cancelled bookings. They stated that customers had cancelled cruises for medical reasons in an attempt to conceal the fact that they had cancelled those cruises and re-booked them through Vision 2000.

[37] In the subsequent BIA application, the judge characterized these findings of fact in regards to the false database entries as follows:

[61] While the Court found that two of the cruise booking specialists had made false entries in the WinCruise database concerning the reasons for cancelling certain cruise bookings, there was no finding that Mr. Szeto participated in that deceptive conduct.

[Emphasis added in original.]

[18] I find that the defendant did nothing so deceitful in the present case. There is no documentation wherein he stated that he was employed when he was not. He did not sign the credit application, so there was no wrongful representation flowing therefrom. In my

view, the statement that he intended to pay the amounts owing under the Lease was more aspirational than a factual representation. Furthermore, I find that he could have had the good faith intent to meet his obligations at the relevant time, given the potential for success of his new Venture. Hence, there is a far less sense of Mr. Ali having acted immorally in the present case. I cannot find that Mr. Ali's conduct was morally unacceptable or harmful to society.

- [19] That said, it should be noted that the test may be satisfied if the Lease was obtained on "false pretences", while not necessarily at the arguably higher "fraud" level. As noted in H.Y. Louie, a creditor need not show that it relied on a representation made to it by the bankrupt in order to establish that the bankrupt obtained its property by false pretences: para. 49.
- [20] However, in my view, the following factors and evidence weigh against a determination that Mr. Ali obtained property from Summit under false pretences:
- a) There is at least some evidence that could support a finding that Mr. Ali's promise to pay had no reasonable hope of being kept. Specifically:
 - i. Mr. Ali had been unemployed from March 2020.
 - ii. In terms of the time proximity, it does appear likely that Mr. Ali owed substantial amounts to others at the time of entering into the Lease, given that he was already selling assets.
 - iii. The fact that Mr. Ali was not able to make even a single payment under the Lease suggests that his plan to pay the amounts owing from the Venture may have been unrealistic.

However, I find that this limited evidence carries insufficient weight to support Summit's proposed conclusion that Mr. Ali obtained the Lease by false pretences.

- b) I am unable to place much weight on Summit's complaint about Mr. Ali's alleged failure to disclose his vehicle sales. It is difficult to say from the material presented exactly how many vehicles would have been owned by Mr. Ali as of the date that the Proposal was prepared. In terms of the valuation, Mr. Ali states that selling vehicles was simply a hobby, rather than a business. Furthermore, even if Mr. Ali made false representations with respect to his alleged vehicle sales, they would have related to the Proposal, rather than the Lease. I am unable to find any causal connection between this alleged false pretence and Summit's agreement to enter the Lease. Indeed, the Lease was entered into well before any representation within the Proposal process. At best, this point adds some potential sense of moral concern about Mr. Ali's broader conduct. However, absent more adequate and reliable information about the nature of the vehicle ownership and sales at the time of the Lease or the proposal, I cannot find that this concern swings the analysis in Summit's favour.
- c) Further, I do not place much weight on Mr. Ali's failure to execute the proposed new credit agreement. Summit decided to move forward in the absence of the execution of this agreement, suggesting that they did not view the requested information as essential to their internal risk assessment.

- d) On the other side of the evidentiary ledger:
- i. I do not find, as the court did in *Amex Bank of Canada v. Johnson*, 2007 ABPC 130, that Mr. Ali had bankruptcy proceedings in mind when he entered the Lease. The fact that he paid the insurance on the vehicle for several months thereafter suggests that he was trying to make his new Venture work, and/or that he was legitimately trying to earn enough income to satisfy his obligations.
 - ii. There was no evidence or admission by Mr. Ali that he was involved in financial wrongdoing at the time he entered into the Lease, such as kiting credit cards: *Amex Bank of Canada* at para. 33.
 - iii. While the Venture lacked certainty, organization, and documentary support, Mr. Ali at least had some experience in the field which could reasonably have lead him to believe he could make the Venture work. I expect Mr. Ali did cast a positive light on his new Venture opportunity, but that is natural at the outset of a new project and is not necessarily indicative of fraud or other misconduct. This is certainly not a case like *Amex Bank of Canada*, where the defendant's only plan to repay monies owed was through gambling: para. 28.
 - iv. I find that Mr. Ali did disclose and discuss his business plans with Mr. McKenzie, thereby softening any concern that might otherwise exist about immoral conduct. Mr. Ali specifically deposes that such conversations took place, while Mr. McKenzie does not directly rebut this assertion--he simply says he cannot recall such a conversation.
 - v. At the time of the Proposal, owned a half interest in a property in Surrey, BC. Likewise, he was only about \$87,000 "under water" at the time. Given the tremendous volatility in the Lower Mainland real estate market, it is possible that Mr. Ali was not strictly "under water" at the time of the Lease. There was about 11 months between the two relevant events.
- [21] While there are factors weighing on either side of the ledger, Summit has not established that Mr. Ali obtained property through deceit. The application is thus dismissed.
- "The Honourable Mr. Justice Branch"
- [1] There is a non-material dispute between the parties as to the terms on which a Manac Flat Deck Trailer was also included within the scope of the Lease.

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