

CANADA / JUDGMENT

Toban v. Nijjer

2005 BCSC 891

COURT

Supreme Court of British Columbia

DECIDED

14 June 2005

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2005 BCSC 891 Toban v. Nijjer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Toban v. Nijjer,

2005 BCSC 891

Date: 20050614

Docket: S023894

Registry: Vancouver

Between:

Stephen Toban

Plaintiff

And:

Marc Nijjer

Defendant

Docket: 216868/VA-01

Registry: Vancouver

IN THE MATTER OF THE

BANKRUPTCY OF MARC NIJER

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for the Plaintiff:

J.L. Williams

Counsel for the Defendant:

B.C. Clark

Date and Place of Trial/Hearing:

April 14, 2005

Vancouver, B.C.

Further Submissions:

May 2, 2005, May 16, 2005

and May 19, 2005

Introduction

- [1] The plaintiff Stephen Toban applies for judgment to be entered against the defendant Marc Nijjer in accordance with the terms of a Rule 37 Offer to Settle. He also seeks a declaration in Mr. Nijjer's bankruptcy proceeding that a judgment if entered would constitute a debt not released by discharge from bankruptcy. He argues that since the settled claim was for fraudulent misrepresentation, a judgment entered in accordance with the terms of the Offer to Settle would be one which survives discharge of the bankrupt, pursuant to s. 178(1)(e) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA].
- [2] The defendant argues that his acceptance of the Offer to Settle is not an admission of the allegations in the pleadings, and that a judgment entered according to the accepted Offer to Settle would constitute a debt that is discharged by bankruptcy.
- [3] Although the application for judgment was brought under Rule 37(16), probably the more relevant provision is Rule 37(20), which states:
- (20) If a party fails to comply with the conditions of an accepted offer to settle, the other party may
- (a) apply for an order in the terms of the accepted offer, or
 - (b) continue the proceeding as if there had been no accepted offer.

Counsel for the defendant stated that he did not object to proceeding to hear the application on its merits. Although there was some discussion at the hearing to the effect that the application should have been brought under Rule 18 or Rule 18A, upon reflection I do not think that is necessary and conclude that the application for judgment can properly be considered under Rule 37(20).

Facts

- [4] The plaintiff is an investment adviser with Global Securities Corporation ("Global"). In his action against the defendant he alleges that the defendant made false representations to Global. The plaintiff claims that the defendant gave to the plaintiff a blank cheque with which to purchase certain securities on the defendant's behalf, and represented to the plaintiff that the account on which the cheque was drawn contained \$100,000, that the defendant had signing authority on the account, and that Global could fill in the amount owing to it and thereby receive payment for the securities.
- [5] According to the plaintiff, Global purchased the securities pursuant to the defendant's instructions and sought to deposit the cheque for a total of US\$51,374.38, but was notified that the cheque was dishonoured on June 15, 2001. The securities were later sold at a loss. The plaintiff took an assignment of Global's claim against the defendant for the amount of the loss, being US\$40,478.33 including interest.
- [6] The defendant made an assignment into bankruptcy on July 17, 2001. In his Statement of Affairs, Mr. Nijjer swore that he was indebted to Global for US\$39,000. Global submitted a Proof of Claim in the bankruptcy for US\$39,053.04. The defendant's application for discharge from bankruptcy was opposed by the plaintiff and another party not involved in the instant application.
- [7] The plaintiff applied in the defendant's bankruptcy proceeding for an order giving leave to bring proceedings against the defendant for fraudulent misrepresentation. The Trustee in Bankruptcy consented to the order, which was granted by Master Doolan. The defendant did not appear.
- [8] The order, dated July 10, 2002, authorizes Stephen Toban to prosecute his claim against Marc Nijjer and to add the Trustee as a party defendant, and states that the right to prosecute the claim is for the purpose only of establishing the amount for which the plaintiff is entitled to prove in the bankruptcy of Marc Nijjer, as an unsecured claim.
- [9] The plaintiff's writ of summons and statement of claim were filed on July 11, 2002, seeking damages of \$40,478.33 for fraudulent misrepresentation, plus interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, and costs. The defendant filed a statement of defence; the trial was set down for August 2004. The plaintiff delivered a Rule 37 Offer to Settle, which was accepted by the defendant on July 5, 2004. The Offer to Settle was in the following terms:

OFFER TO SETTLE

TO: THE DEFENDANT

The plaintiff offers to settle this proceeding on the following terms:

1. US\$25,000 including interest; and

2. costs in accordance with Rule 37(22) and (37).

[10] The defendant subsequently took the position that the accepted Offer to Settle resulted in a monetary debt discharged by his bankruptcy, and refused to pay the funds or execute a consent to judgment in the amount of the accepted offer.

[11] In an affidavit filed in the bankruptcy proceedings, the plaintiff deposed that the allegations in the statement of claim are true. The defendant filed an affidavit in this application in which he denied the plaintiff's allegations, and stated that he had specifically told the plaintiff that there was no money in the account. However, since this is an application to enter judgment pursuant to an accepted Offer to Settle, rather than an application for judgment at a summary trial, it is not necessary for me to resolve issues of credibility or make findings of fact regarding the claim.

[12] The defendant has not yet been discharged from bankruptcy.

Issues

[13] The parties argued three issues on this application: whether the absence of specific reference to fraudulent misrepresentation in the Offer to Settle means that the plaintiff is unable to rely on the underlying pleadings in order to bring himself under s. 178(1)(e) of the BIA; whether Rule 37(12) bars the court from looking behind the accepted Offer to Settle at the underlying pleadings; and whether the accepted Offer to Settle is a new post-bankruptcy contract. The court requested further written submissions on the latter point, which arose at the hearing. Counsel for the plaintiff conceded in his written submissions that pursuant to s. 121 of the BIA, a settlement agreement which settles a pre-filing obligation of the bankrupt may modify the obligation through quantifying the amount, but in the absence of other terms it does not become a post-filing obligation. Nor does it change the nature of the obligation from one which is not released by discharge to one which is. Given that concession, which seems well-founded, I will consider only the first two issues.

(a) Does the absence of a reference to fraudulent misrepresentation in the Offer to Settle preclude the plaintiff from reliance on the pleadings in connection with the characterization of the debt or liability for the purposes of s. 178(1) of the BIA?

[14] The plaintiff seeks to bring himself under s. 178(1)(e) of the BIA, which states:

178. (1) An order of discharge does not release the bankrupt from

(e) any debt or liability for obtaining property by false pretences or fraudulent misrepresentation;

[15] Counsel did not bring to my attention any previously decided case in which the precise point raised by this case has been addressed.

- [16] The most significant case from the plaintiff's perspective is *Re Demitor* (1993), 137 A.R. 381 (Q.B.) [Demitor]. The issue there was whether a consent judgment for a monetary sum against a bankrupt, which was silent as to the nature of the claim, would survive discharge from bankruptcy. The claim was for fraudulent misrepresentation.
- [17] Mr. Demitor argued that the judgment was a money judgment in debt, and no more. He relied on *Viking Well Services v. Metrocan Leasing* (1988), 67 C.B.R. (N.S.) 278 (Alta. C.A.) [Viking Well]. In *Viking Well*, the Alberta Court of Appeal considered whether the fact that a lessee had consented to a money judgment constituted an admission of inability to pay its debts and thus an event of default under the lease. The Court of Appeal held at 280 that the consent judgment was an acknowledgment of a debt, and not an admission by the lessee of its inability to pay its debts generally.
- [18] The Registrar in *Bankruptcy in Demitor* also considered *Beneficial Finance Co. of Canada v. Williamson* (1971), 16 C.B.R. (N.S.) 30 (Ont. Co. Ct.). There, in proceedings against a discharged bankrupt who had executed a consent judgment prior to his discharge, *Shea Co. Ct. J.* held that the consent judgment, based on minutes of settlement, decided the issue of fraudulent misrepresentation in favour of the judgment creditor just as if that issue had been so decided after a trial of that action. As a result, the judgment creditor was free to pursue execution on the consent judgment.
- [19] In *Demitor*, Registrar Funduk held that *Viking Well* was distinguishable, as *Viking Well* did not arise in the bankruptcy context. He found that *Demitor* and *Beneficial Finance* were both "geared solely to 178(1)(e)" and "not to whether there is a debt owed by the bankrupt at the time he went into bankruptcy." Registrar Funduk concluded as follows at 387-388:

To treat the consent judgment as just an acknowledgment of a debt would make it (and the action itself) superfluous. There is no need for that. The debt was both admitted and proved in the bankruptcy without the necessity of an action, and the action is solely to deal with the issue of s. 178(1)(e). That is what the chambers judge ordered the action to be for.

...

It might also have been better if the consent judgment had expressly declared that the amount it was for was a debt that survived the discharge by virtue of s. 178(1)(e). But given the factual backdrop to the action that is not critical. The factual backdrop mandates that the issue raised by the Treasury Branches in its pleading was admitted by the Bankrupt when he consented to the judgment. It is necessarily there in this case.

...

I conclude that the consent judgment survives the discharge: s. 178(1)(e).

- [20] *Demitor* and *Beneficial Finance* were cited with approval in the reasons for judgment of the majority in *Canada (Attorney General) v. Bourassa (Trustee of)*, [2002] A.J. No. 1091 (C.A.) (QL) [Bourassa], where McClung J.A. stated at ¶ 5-6:

While it is true that s. 178(1)(e) does not expressly require a court declaration, a creditor, even the Crown, cannot be permitted to make its own determination of fraud and then revert to collection of its debt on that basis. A court order declaring fraud, whether obtained before, during or after a discharge from bankruptcy, is required to free a creditor to pursue its claim against a discharged bankrupt.

...

The case law reflects the various ways in which such orders can be sought. For example, when a pre-bankruptcy judgment does not contain an express finding of fraud, a creditor can either seek a declaration of fraud at the time of the discharge application or he can seek a declaration from the Court of Queen's Bench after the discharge: *Berthold v. McLellan* (1994), 19 Alta. L.R. (3d) 28 (C.A.). Furthermore, if no judgment exists at the time of the bankruptcy, a creditor may subsequently initiate an action to recover the debt, pleading fraud. If the creditor can prove fraud, the existence of the discharge from bankruptcy will be no defence to the action: *Moose Jaw Credit Union Limited v. Kennedy* (1981), 13 Sask. R. 252 (Q.B.); *Canadian Imperial Bank of Commerce v. Aksoy* (1989), 75 C.B.R. (N.S.) 248; [1989] O.J. No. 867 (Ont. Dist. Ct.). On the other hand, when a judgment, which pre-dates the bankruptcy, expressly finds fraud, no further court order would be needed before the creditor may pursue collection of its debt: *Smith (Re)* (1985), 43 Sask. R. 27 (Q.B.), *aff'd* (1986), 45 Sask. R. 240 (C.A.). The same is true of a consent judgment from which an admission of fraud can be inferred: *Beneficial Finance v. Williamson* (1971), 16 C.B.R. (N.S.) 30 (Ont. Co. Ct.); *Demitor (Re)* (1993), 137 A.R. 381 (Master).

- [21] See also *Re Patmore*, 2003 ABQB 450. In *Patmore*, a case considering the exception for "fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity" in s. 178(1)(d) of the BIA, Master Breuitkreuz found that although the word "fraud" did not appear in either the statement of claim, the reasons for judgment or the formal judgment in the prior Queen's Bench action in the case, "there is no doubt in my mind that the conduct of the bankrupt amounts to misappropriation within the meaning of s. 178(1)(d) of the BIA."
- [22] Both *Bourassa* and *Patmore* place significant importance on the role of a court's findings in relation to fraud. However, they support the position in *Demitor* that where there is a consent judgment, an inference as to the nature of the claim can be drawn from the material before the court, including the pleadings (see especially *Patmore* at ¶ 9).
- [23] I note that in *Patmore*, Master Breuitkreuz correctly emphasizes the caution that a court must exercise before being satisfied that fraud has been proved, and the consequences that may follow an unfounded allegation of fraud (a principle earlier stated in *Bourassa*).

- [24] Counsel for the plaintiff also cites Ontario cases confirming that judges can look behind the face of a judgment to determine whether a debt arises out of fraud: *Holmes v. Mayer*, [2001] O.J. No. 2637 (Ont. C.A.), aff'g (2000), 17 C.B.R. (4th) 77 (S.C.J.); *Perciasepe v. Smith*, [2003] O.J. No. 6043, 50 C.B.R. (4th) 241 (S.C.J.), aff'd [2004] O.J. No. 3110 (C.A.) (to determine if a debt is based on fraud and survives discharge, the court can look at the claim underlying a default judgment).
- [25] Finally, counsel for the plaintiff refers to *Turner v. Midland Doherty* (1992), 70 B.C.L.R. (2d) 268 (S.C.), holding that a court can consider the reasons for judgment in determining whether a debt survives bankruptcy and is not limited to the terms of the formal order.
- [26] The plaintiff's authorities support the proposition that in determining whether a debt survives discharge from bankruptcy, courts may look behind consent orders, default judgments and formal judgments to see if the underlying materials, including pleadings and reasons for judgment, relate to fraud. I also note a British Columbia authority holding that where there are written reasons for judgment and a creditor seeks a declaration that the debt survives discharge under s. 178(1) of the BIA, the reasons speak for themselves and "it would be inappropriate to consider pleadings and argument made at trial or before the Court of Appeal": *Re Hottman*, 2003 BCSC 98 at ¶ 21.
- [27] The defendant's position is that the essential issue on this application is the effect of accepting a Rule 37 offer to settle. His counsel, Mr. Clark, argued that here the defendant compromised in order to avoid a trial, but did not agree to the underlying basis of the claim, nor did he agree to a consent judgment. Thus, counsel submitted, the Demitor case and others involving consent judgments are of no assistance.
- [28] Counsel for the defendant referred to the terms of Master Doolan's order permitting the plaintiff to proceed, which grants "that the moving party's right to prosecute his claim against the bankrupt shall be for the purpose only of establishing the amount for which he is entitled to prove in the bankruptcy of Marc Nijjer, as an unsecured claim." He noted that the consent given by the Trustee is similarly worded. Counsel for the plaintiff submitted in response that the Master's order was premised on the claim being for fraudulent misrepresentation, referring to the materials filed in support of that order.
- [29] The defendant's position is that the plaintiff can enter judgment pursuant to the accepted Offer to Settle, but that such a judgment would be solely for the amount of money stated in the Offer to Settle, would be different from a consent judgment, and would not be an admission of fraud. Mr. Clark submitted that the plaintiff could have drafted the Offer to Settle to include an admission of fraud, or a term requiring the defendant to consent to judgment on the pleadings, but did not include such terms.
- [30] Counsel for the defendant argues that for policy reasons, the court should not look beyond the terms of the accepted Offer to Settle. This is because, Mr. Clark urged, the defendant was in a "Catch 22" position, being vulnerable to the double costs penalty if he rejected the offer and was then unsuccessful at trial, even if at trial he was found not to have made the alleged

fraudulent misrepresentations but instead simply to be liable in debt. Mr. Clark argued that the defendant had to be able to accept the Offer to Settle (which amounted to a significant discount from the original claim) without being taken to admit the allegations in the statement of claim. The plaintiff responds to that argument by noting that the statement of claim only sought damages for fraudulent misrepresentation, and made no other claim. Thus, plaintiff's counsel argued, there would have been no basis for a judgment in debt and the situation hypothesized by Mr. Clark could never have come to pass.

- [31] I will defer stating my conclusion on this issue until I have considered the effect of Rule 37(12), because the submissions on the two issues are inter-related.
- (b) Does Rule 37(12) bar the court from looking behind the accepted offer to settle?
- [32] Rule 37(12) states: "An offer to settle is not an admission."
- [33] The defendant's position is that the logical extension of the rule is that, likewise, an acceptance of an offer to settle cannot be an admission and the defendant's acceptance of the Offer to Settle in this case cannot be used with respect to s. 178(1)(e) of the BIA.
- [34] Counsel for the plaintiff responds first by saying that Rule 37(12) is irrelevant with respect to a settled action, arguing that the purpose of the subrule is to prevent the use of an offer to settle itself as evidence in a proceeding: *Fox Mechanical Ltd. v. Barclay Construction Corp.*, [1995] B.C.J. No. 1815 (S.C.) (QL) [Fox Mechanical].
- [35] Mr. Williams also submits that the plaintiff is in fact not relying on the settlement: because the Offer to Settle is silent as to the nature of the obligation, the plaintiff relies instead on the underlying action to show that the obligation meets the criteria in s. 178(1)(e) of the BIA.
- [36] As an alternative argument, counsel for the plaintiff submits that Rule 37(12) applies only to an offer to settle, and not to the acceptance of an offer, relying on the principle *expressio unius est exclusio alterius*. Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths, 2002) states the principle at 187:

The reasoning goes as follows: if the legislature had intended to include comparable items, it would have mentioned them or described them using general terms; it would not have mentioned some while saying nothing of the others because to do so would violate a convention of communication. If I announce that I saw a car accident in which two people were killed, my statement would be true and informative even if three people were killed, but my listeners or readers legitimately would assume that only two were killed. A basic convention of communication is that speakers say as much as is required but no more than that, to achieve their goal in speaking. Therefore, when the intention is not to include all comparable items, i.e. when the mentioned item or items are meant to be examples rather than an exhaustive list, a competent drafter signals that intention with appropriate language. No competent drafter would mention some items but not others without language signalling that intent.

[37] As further support for the argument, counsel for the plaintiff argues that reference to acceptance of offers to settle was deliberately omitted from Rule 37(12), asserting that the comparable Alberta rule includes acceptances. Rule 171 of the Alberta Rules of Court, Alta. Reg. 390/68 reads:

Unless otherwise expressly stated therein, notice of payment into Court under Rule 166, with or without an offer to surrender a counterclaim, or an offer to settle under Rules 169 and 170 or an acceptance of a confession shall be deemed to be an offer of compromise made without prejudice, and shall not be deemed an admission. [Emphasis added]

[38] Rule 171 does not seem on its face to apply to an acceptance of an offer to settle per se, as opposed to an acceptance of a confession of a judgment. However, I do not purport to decide the point.

[39] One of the purposes of Rule 37(12) is to encourage the making of offers of settlement, because the settlement of litigation is in the public interest. It is not obvious how that purpose would be served by a rule precluding a party from leading evidence that a settlement agreement had been reached. Rule 37(20) allows for the kind of application made in this case, to enter judgment pursuant to an accepted offer to settle, and obviously contemplates that the accepted offer to settle may be tendered in evidence in support of such an application. Arguably, the accepted Offer to Settle here is not being tendered as an admission but instead as evidence of a completed contract, but in any event I do not find that Rule 37(12) supports the defendant's position.

Conclusion

[40] The burden is on the party who asserts that a debt or liability survives discharge from bankruptcy to show that the debt or liability falls within one of the categories listed in s. 178(1) of the BIA. A conclusion that the debt or liability is "for obtaining property by false pretences or fraudulent misrepresentation" should not be reached without a proper foundation. The weight of the authorities in circumstances similar to those before me supports the conclusion that courts, in deciding whether a debt or liability falls within s. 178(1) of the BIA, should consider all relevant information regarding the nature of the claim and its disposition.

[41] In this case the Offer to Settle did not specify the nature of the claim and did not require the defendant to consent to judgment. However, the Offer to Settle does not exist in a vacuum: it was an offer to settle a specific action, namely the action by Stephen Toban for damages for fraudulent misrepresentation against Marc Nijjer.

- [42] I am not persuaded that the wording of s. 178(1) of the BIA, the authorities, Rule 37(12), or any policy considerations require the Offer to Settle to be treated differently than would a consent judgment in the context of this case. As with the consent judgment in Demitor, in considering whether the "debt or liability" is "for obtaining property by false pretences or fraudulent misrepresentation", I can have regard not only to the bare wording of the Offer to Settle but also to what claim it was that the acceptance settled.
- [43] The plaintiff will have judgment against the defendant in the terms of the Offer to Settle. I find that the judgment creates a liability that falls within s. 178(1)(e) of the BIA and that it will survive the discharge from bankruptcy of the defendant.

"Lynn Smith, J."

The Honourable Madam Justice Lynn Smith

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Prepared on 29 October 2026 · Esheria