

HONG KONG / JUDGMENT

RE TAM MAN ON JONATHAN

COURT

Court of First Instance

DECIDED

1 August 2007

CASE / FILE NUMBER

HCB7453/2006

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bjbj HCB7453/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE IN BANKRUPTCY PROCEEDINGS NO.7453 OF 2006

Re: TAM MAN ON JONATHAN, Debtor and Ex Parte: DAH SING BANK LIMITED, Creditor

Before : Hon Poon J in Chambers Date of Hearing : 1 August 2007 Date of Decision : 1 August 2007

DECISION

Introduction

AUTONUMOUT The debtor was the petitioner s customer. He held a credit card issued by the petitioner since 27 July 1999. On 23 May 2001, the petitioner granted to the debtor revolving credit facilities for a limit of HK\$81,000. AUTONUMOUT It is the petitioner s case that the debtor had defaulted in making repayment of the outstanding sums due under the credit card account and the loan account since December 2005 and had failed to settle the same despite repeated requests. The petitioner accordingly terminated both accounts and commenced DCCJ2431/2006 in the District Court. On 19 June 2006, the petitioner obtained a default judgment for a total sum of HK\$138,982.97 with interest and fixed costs. AUTONUMOUT On 2 August 2006, a statutory demand based on the default judgment was served upon the debtor by advertisement in Sing Pao Daily News. The demand was not met. AUTONUMOUT On 11 September 2006, the petitioner presented the present petition. Pursuant to leave granted under an order dated 25 October 2006, the petition was served on the debtor by way of substituted service by sending the same at Flat B, 34/F, Block 4, Shun Lee Disciplined Services Quarters, No.32 Lee On Road, Kowloon (the Lee On Road Address) and advertisement in newspaper. The substituted service was then effected on 9 November 2006. AUTONUMOUT The petition was first heard by the master on 22 November 2006.

The debtor opposed the petition and indicated that he could pay but the petitioner had yet to give him the exact amount outstanding. The master then adjourned the petition to 13 December 2006. AUTONUMOUT Subsequently on 12 December 2006, the debtor made repayment to the petitioner in full. What has been remaining outstanding since then is the costs of these proceedings.

Discussion AUTONUMOUT The debtor argued that he is not liable for the costs by relying on a number of points. AUTONUMOUT First, he contended that the petitioner had unreasonably terminated both the credit card account and the loan account. The petitioner had thereby acted in breach of the credit card agreement and the loan agreement. This argument is simply untenable. AUTONUMOUT The credit limit for the credit card account was HK\$42,000. According to the statement dated 4 December 2005, the outstanding balance was HK\$40,813.58. The debtor should pay either the full amount or a minimum balance of HK\$2,041. On 8 December 2005, he repaid HK\$2,200. But on the very next day, he made a cash advance of HK\$3,500 from the credit card account. Thus by the date of the next statement, that is, 4 January 2006, the total outstanding balance stood at HK\$43,149.81, which exceeded the credit limit. In those circumstances, the petitioner was entitled to terminate the credit card agreement and demand full payment under the credit card agreement. AUTONUMOUT According to the statement dated 6 December 2005, the outstanding balance for the revolving facilities was HK\$82,465.24. The debtor should pay the sum in full or a minimum balance of HK\$2,844. However, instead of making any repayment, he made a cash advance of HK\$3,000 on 2 January 2006. Under those circumstances, the petitioner was under the loan agreement entitled to terminate the same and demand full repayment.

AUTONUMOUT When the debtor failed to pay up, the petitioner was entitled to commence proceedings, including bankruptcy proceedings, against him. AUTONUMOUT The debtor told me this morning that he will apply to the District Court to set aside the default judgment this afternoon. Whether he will really proceed with that application remains to be seen. But having already paid up the default judgment in full, I wonder if he has any basis for doing so now.

AUTONUMOUT Next, the debtor also complained that the petitioner had acted unreasonably by engaging a debt collector to press him for repayment. I would only say that this complaint is wholly irrelevant for present purposes. AUTONUMOUT Third, the debtor complained that the petitioner had asked him unreasonably to bear the costs of the debt collector and to pay up the legal costs without giving him a breakdown. But it should be noted that all along, the debtor has been adamant that he is not liable for the petitioner's costs at all. I do not think he can derive much assistance from this complaint. AUTONUMOUT Fourth, the debtor contended that he had never received any documents in the District Court action or in the present proceedings. This attack on service does not withstand a closer scrutiny. AUTONUMOUT The debtor first said he notified that petitioner in May 2006 that he had moved from the Lee On Road Address to Room 1601, 16/F, Halson Building, No.1 Jubilee Street, Central, Hong Kong (the Jubilee Street Address). This the petitioner denied. The debtor has failed to adduce any evidence to support his allegation. He sought to rely on a letter purportedly addressed to the petitioner dated 4 May 2006. This letter is self-serving and does not on its face show that the petitioner had received it. More importantly, all the monthly statements of for the credit card and loan between December 2005 and August 2006 were all sent to the Lee On Road Address. Two points arose. First, had the petitioner received the notification of change of address in May 2006 as alleged, there is no

reason why it did not send the monthly statements to the Jubilee Street Address thereafter. Second, there is no indication from the debtor's evidence whatsoever that he had not received the monthly statements sent to the Lee On Road Address. I reject the debtor's allegation. This morning, the debtor said that the monthly statements were emailed to him by the petitioner. Even assuming that that was the case, I can still see no reason why the petitioner did not change his address if it in fact had received the notification of change of address as alleged.

AUTONUMOUT The debtor next said that all along he had never changed his office address at 6-9/F, Harbour Building, 38 Pier Road, Central, Hong Kong (the Office Address). He said that the petitioner could have contacted him and delivered all necessary documents at the Office Address even up to now. He relied on a demand letter dated 18 January 2006 sent by the debt collector on behalf of the petitioner to the Office Address. What he has not disclosed, however, is that when a second demand letter dated 3 February 2006 was sent to the Office Address, he replied to the petitioner by a letter dated 8 February 2006 and faxed on 10 February 2006 and attached to the letter a copy envelope of the said letter of 18 January 2006. On the copy envelope, he wrote that he had never provided the Office Address to the petitioner as his personal address and that the Office Address had nothing to do with him at all. What he wrote down there flatly contradicts his allegation that the petitioner could have contacted him and delivered documents at the Office Address. AUTONUMOUT When this self-contradiction was pointed out to him this morning, the debtor alleged that he had faxed with his letter a list of addresses at the Harbour Building and said that that he in fact asked the petitioner not to send documents to those addresses and that he had expressly asked the petitioner to send documents to the Office Address. He then produced the list for my perusal. Mr Wong, counsel for the petitioner, told me that the petitioner had not received this list at all. I would only say that this new allegation and the list is inconsistent with what he had written down on the copy envelope above. And the debtor has failed to offer any credible explanation for the inconsistency. I reject this new allegation. This is in my view a mere afterthought fabricated by the debtor. AUTONUMOUT At the hearing on 22 November 2006, the debtor gave the court a new address as Room 705, 222 Nathan Road, Jordan, Tsim Sha Tsui, Kowloon (the Nathan Road Address). As the debtor is indebted to the petitioner's subsidiary for another debt, that subsidiary commenced DCCJ74/2007 against him on 4 January 2007. An attempt was made to serve the writ at the Nathan Road Address on 6 January 2007. When the process server arrived at the Nathan Road Address, he found that it was a hotel. He was advised that no such person as the debtor lived at the hotel. No service could be effected there. The writ was served by insertion into the letterbox of the Lee On Road Address on 6 January 2007. The debtor later acknowledged service. Although on the acknowledgment, the debtor gave the Office Address as his address, it is beyond doubt that he was able to receive the writ through the service of the same at the Lee On Road Address. AUTONUMOUT The debtor gave yet another address in his 3rd affirmation, which is, Room 906, Hing Yip Commercial Centre, No.272 Des Voeux Road Central, Hong Kong. But there is no evidence to show that the petitioner was aware of such address beforehand. AUTONUMOUT For the above reasons, I accept the petitioner's case that the Lee On Road Address was at all material times the debtor's last known address. When it was unable to effect personal service of both the statutory demand and the petition on him at the Lee On Road Address, it was legitimate for the petitioner to serve those documents on him by way of

substituted service. The debtor's attack on the lack of proper service on him must fail. AUTONUMOUT Finally, the debtor relied on the decision of Yam J in *Hang Seng Credit Card Limited v. Tsang Nga Lee and others*, HCA13228/1999, unreported, 10 July 2000 and argued that the costs provision in the credit card agreement and the loan agreement under which the debtor has the contractual obligations to pay the petitioner costs incurred for the recovery of the sums are unconscionable and hence unenforceable. The simple answer to this contention is, as I will demonstrate below, that the petitioner may be awarded costs without reference to those provisions. AUTONUMOUT All the objections raised by the debtor in opposing costs fail. And I reject them accordingly.

Conclusion

AUTONUMOUT Costs should normally follow the event. Here, as I have said, the petitioner is justified in commencing the present bankruptcy proceedings against the debtor and in serving the statutory demand and petition by substituted service. The debtor finally paid up on 12 December 2006. Had he paid up before the commencement of these proceedings, these proceedings and costs could have been avoided. Had he not unreasonably resisted costs, all the adjournments could have avoided as well. In all the circumstances, I think he should bear all the costs of these proceedings. I will therefore exercise my discretion and order that the debtor do pay the petitioner the costs of the petition, including all the costs reserved and the costs of today's hearing, to be taxed if not agreed. (J. Poon) Judge of the Court of First Instance High Court Mr Joeson Wong, instructed by Messrs Keith Lam Lau & Chan, for the Petitioner The Debtor, in person, present PAGE - PAGE A B C D E F G H I J K 1udk 1udk \!t"(\#A t"(\#A t"(\# &`#\$ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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