

Drougov (Re)

IN THE MATTER OF the Bankruptcy of Anatoly Drougov of the
City of Toronto in the Province of Ontario

[2003] O.J. No. 4312
Court File No. 31-411155

Ontario Superior Court of Justice In Bankruptcy and Insolvency Registrar Sproat

October 1, 2003.
(31 paras.)

Bankruptcy — Voluntary assignments — Setting aside — Grounds.

Motion by the bankrupt, Drougov, for an order annulling the bankruptcy or in the alternative, an order staying the bankruptcy or removing the trustee. The bankrupt, who was an accountant, argued that the filing was an abuse of process and that the trustee did not follow the appropriate procedure for the assignment into bankruptcy. He argued that he was mentally incompetent and the Bankruptcy and Insolvency Act did not apply to him. The bankrupt also claimed that he did not consent to the assignment. The bankrupt argued that the trustee seized an account that belonged to his cousin. The trustee denied any knowledge of the bankrupt's mental condition.

HELD: Motion dismissed. There were no specific exclusions to the applicability of the Act. The provisions of the Act were not strictly complied with, but the non-compliance was to the benefit of the bankrupt. The bankrupt knew that he was in bankruptcy and benefited from it. There was evidence that the bankrupt had attempted to transfer the account into the name of others.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, ss. 69.3, 181.

Counsel:

A. Drougov, on his own behalf.
S. Mitra, for the trustee.
I. Dick, for the Office of the Superintendent of Bankruptcy.
V. Kats, for the creditor, Tchernyi.

¶ 1 REGISTRAR SPROAT:-- This is a motion by the bankrupt for an order annulling the bankruptcy pursuant to s. 181 of the Bankruptcy and Insolvency Act (the "BIA"). The grounds set forth in the notice of motion include the following, among other, grounds: that the filing is an abuse of process, that the filing was without the knowledge and permission of the bankrupt, that there was no benefit to the bankrupt arising from the filing, that the trustee did not follow the appropriate procedure of the Bankruptcy Assistance Program ("BAP") and that the trustee deliberately took steps to mislead the bankrupt.

¶ 2 Although the bankrupt desires to have the bankruptcy annulled in its entirety, the bankrupt alternatively seeks a stay of the bankruptcy or the removal of the trustee. As to the alternative relief, the trustee and the Office of the Superintendent of Bankruptcy (the "OSB") do not object to the substitution but question whether an acceptable substitute trustee, willing to assume carriage of this matter, can be located. Counsel for the creditor opposes a substitution on the grounds that the trustee has discharged its duties extraordinarily well, in the circumstances.

¶ 3 As argument of the motion progressed, some of these grounds were abandoned and others added. In hearing this motion, I granted the bankrupt tremendous latitude insofar as his submissions were concerned. I granted leave on short or even no notice to the respondents to permit the bankrupt to raise additional or new arguments. As to the latter arguments, the responding parties agreed to the same so as to permit the motion to be fully heard.

¶ 4 I also granted leave to the bankrupt to file further affidavit material at the outset of the motion, despite some objection on the part of the respondents that the affidavit contained argument, irrelevant and/or inadmissible evidence. I allowed the affidavit to be filed on the basis that I retained the discretion to weigh the evidence and to determine which aspects of the affidavit were argument, in view of the fact that the bankrupt was not represented by counsel.

¶ 5 The bankrupt raised a preliminary issue that the transcript of his cross-examination be struck on the basis that counsel for the trustee used psychological techniques aimed to anger or tire the bankrupt and thereby elicit inaccurate answers. The bankrupt alleged that counsel for the trustee angered him, asked irrelevant questions, used illegal tactics, yelled and dictated the answers. Thus, the bankrupt claimed that he was not responsible for the answers given on the examination because he was psychologically compromised. I reviewed the entire transcript and, while I cannot assess from the transcript whether counsel yelled, I determined that the bankrupt's allegations were unfounded and proceeded to permit counsel for the trustee to rely on the transcript, to the extent counsel saw fit.

¶ 6 The bankrupt raised another issue concerning the filing of the trustee's supplementary factum. The bankrupt submitted that the trustee should not be permitted to file the supplementary factum as it was served only two days before the motion. I permitted the transcript to be filed on the basis that much of that supplementary factum related to the evidence on the examination of the bankrupt.

¶ 7 With these preliminary issues and objections disposed of, the motion proceeded and was fully argued. As earlier indicated, the motion to annul the bankruptcy was brought pursuant to s. 181 of the BIA, which provides as follows:

"Where, in the opinion of the court, a receiving order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy."

¶ 8 I will address each of the arguments of the bankrupt in turn.

The Bankruptcy should not have been filed due to the bankrupt's medical condition

¶ 9 The bankrupt submitted, on the basis of the medical evidence filed in his supplementary affidavit, that he was mentally incompetent. The bankrupt does not allege that the mental incompetence relates to his ability to appreciate the consequences of filing an assignment in bankruptcy or incapacity. Rather, the bankrupt submits that the BIA does not apply to mental incompetents and that it was the responsibility of the trustee to warn him of the inapplicability of the BIA and to inform the OSB of his mental state. Thus, notwithstanding the fact that the evidence of the mental incompetence is tenuous (it is a nurse's notation of what the bankrupt disclosed to her), the bankrupt submitted that, because he is a schizophrenic, the BIA has no application. In support of this submission, the bankrupt relies on a passage from Houlden and Morawetz at paragraph D33(2)(h). This passage, citing the decision in *Re Buchner* (1935), 17 C.B.R. 155 (Ont. C.A.), states:

"... Fisher, J.A. of the Ontario Supreme Court was of the opinion that a committee of a mental incompetent should not make an assignment because the Bankruptcy and Insolvency Act makes no provision for the maintenance of the incompetent in priority to the payment of the claims of creditors."

¶ 10 The trustee does not agree with the bankrupt's position and, in any event, denies any knowledge of the bankrupt's mental condition.

¶ 11 In my view, neither the case nor the quoted passage supports the position of the bankrupt. This decision supports the proposition that a committee of the mental incompetent should not make an assignment because there is no special priority or treatment in the BIA to provide for the needs of a mental incompetent. I have examined the definition of "person" and "insolvent person" in the BIA and note that these definitions are rather expansive and general. In my review of the provisions of the BIA, it seems to me that there are no specified exclusions to the applicability of the BIA. Thus, the bankrupt's motion on this ground must fail.

The Bankruptcy Documents should not have been signed at the first meeting with the trustee

¶ 12 The bankrupt also submits that bankruptcy documents should not have been signed at the first meeting with a trustee, but rather at a second meeting. He relies upon the terms and provisions of the BAP that refers to consultations with two trustees in bankruptcy. The bankrupt claims that, since he only consulted the trustee, there should have been no filing in bankruptcy. Further, the bankrupt submits that the bankruptcy is an abuse of process since he never applied for or intended to apply for BAP.

¶ 13 The bankrupt, in his submissions, did admit that he spoke to another trustee (Shiner) about the bankruptcy process, but complained that that trustee only talked about money or the cost of the bankruptcy. Thereafter, the bankrupt complained to the OSB that no one would talk to him about bankruptcy (because of the cost) and it was after this complaint that the OSB arranged for the bankrupt to see Rusinek. The bankrupt claimed that he did not have any counselling and that he was not counselled on other alternatives. He indicated that after the consultation, Rusinek was to have contacted the OSB and ought to have complied with the BAP terms.

¶ 14 Ultimately, the bankrupt claims to have no knowledge as to how the assignment was signed (although he agreed his signature appeared on the Statement of Affairs and the application form for the BAP program). The bankrupt claims that he doesn't understand how he ended up in bankruptcy and that he only wanted to explore his options.

¶ 15 The bankrupt seems to be suggesting that the trustee solicited his assignment in bankruptcy (see the excerpt from the Houlden and Morawetz text, p. 727 relied upon by the bankrupt). However, it seems to me that there is no cogent evidence that the trustee in any way solicited the assignment. In fact, there is evidence that Shiner advised the bankrupt that he need not file for bankruptcy.

¶ 16 On my review of the evidence, it is clear that the provisions of BAP were not strictly complied with in the circumstances of this case. However, it is my view that such non-compliance was to the benefit of the bankrupt. It should be noted that the purpose of BAP is to provide impecunious persons with access to the bankruptcy process. Trustees in bankruptcy are called upon, under the auspices of this program, to waive the fees associated in administering the estate, where the person seeking the protection of the BIA has no resources to fund the administration. It is for this reason that a person seeking to participate in the BAP must consult two trustees in bankruptcy. In my view, the fact that the BAP requirements were not strictly adhered to was to the bankrupt's benefit and is not fatal to the filing of the assignment in bankruptcy.

¶ 17 In any event, I am of the view that it was nonetheless the intention of the bankrupt to file an assignment in bankruptcy. It should be noted that a creditor (Tchernyi) had issued a statement of claim on October 1, 2002 and the statement of claim was served upon the bankrupt on October 17, 2002. The bankrupt attended on the trustee and executed the bankruptcy documents on October 10, 2002. On October 18, 2002, Tchernyi's solicitor received a fax copy of the assignment and, although the fax did not indicate who sent the fax, Tchernyi's solicitor surmises that it was the bankrupt, as it was received the day after the statement of claim was served upon the bankrupt (see the affidavit of service). In addition, on October 22, 2002, the bankrupt wrote to the court to inform the court of the bankruptcy and to advise that Tchernyi's claim was to be "considered and questioned in the bankruptcy" (see affidavit of Goldbloom). I am persuaded that the bankrupt clearly knew that he was in bankruptcy and that he benefitted from the bankruptcy by virtue of his stay of proceedings provided for in s. 69.3 of the BIA.

¶ 18 In addition, it should be noted that it was not until the trustee had learned of the bankrupt's trading account with Ameritrade in the USA (the "Ameritrade account") and that the trustee had taken steps to realized upon the Ameritrade account that the bankrupt brought the

within motion. In my view, the timing of the objection to the bankruptcy and this motion to annul the bankruptcy is telling.

The trustee breached the Code of Ethics

¶ 19 It was alleged by the bankrupt that the trustee breached the Code of Ethics, that the trustee lied or was not honest (it was alleged that the trustee said he was a lawyer), that the trustee garbled his words and that the trustee did not fully explain the bankruptcy process and the trustee's duties to him. It was further alleged that the trustee disclosed confidential information by contacting social assistance and advising that the bankrupt had money in the estate. The bankrupt called the trustee corrupt and coercive.

¶ 20 I have reviewed the evidence filed on this motion and am not persuaded on this evidence that the trustee acted in contravention of the Code of Ethics or otherwise breached his duties as trustee.

Trustee took money that belonged to his cousin

¶ 21 As noted above, the trustee realized upon the Ameritrade account. It was alleged by the bankrupt that the Ameritrade account belonged to his cousin. Alternatively, the bankrupt argued that if the money belonged to him, he was not insolvent (the sum received by the trustee was roughly \$92,000).

¶ 22 I do not accept this submission for the reasons outlined above (regarding knowledge of the bankruptcy and the timing of the motion). I accept the trustee's evidence regarding the bankrupt's attempts to transfer the Ameritrade account into the name of others (jointly or otherwise). This ground also fails for the additional reason that the bankrupt's proven creditors to date are in excess of \$190,000. Even if one were to exclude the Tchernyi debt (which is denied by the bankrupt), the proceeds of the Ameritrade account are insufficient to pay all of the bankrupt's debts.

¶ 23 The test on a motion to annul a bankruptcy is discretionary and good reasons must be advanced to support the exercise of discretion. For the above reasons, I am not persuaded that the facts of this case are such that the exercise of my discretion is warranted. In my view, I must consider the interests of both the bankrupt and the creditors.

¶ 24 I am also unable to say, in the circumstances of this case, that the assignment ought not to have been filed in the first place (see *Re Coveny* (1993), [\[1993\] O.J. No. 2723](#), Ont. Ct. (G.D.) (per Chadwick J.)). In this case, the bankrupt was aware of the assignment and the protections afforded to him by bankruptcy legislation. He had applied for and received assistance with the filing from the BAP. He desired to file an assignment in bankruptcy. He knew that Tchernyi had demanded payment and that Tchernyi's litigation would be stayed by the bankruptcy. The bankrupt is an accountant and he is not, in my view, unsophisticated. In my view, the bankrupt was aware at all material times that he was making an assignment in bankruptcy.

¶ 25 In addition, the bankrupt's financial condition was such that he was in fact insolvent. He had debts that exceeded the value of his assets and he had no ability to pay his debts as they fell due, in view of his income level resulting from unemployment. At the date of the issuance of the statement of claim by Tchernyi, the bankrupt was unemployed. It is clear that Tchernyi was demanding payment and had been for some time. In my view, no useful purpose would be served in annulling the bankruptcy and indeed, it does not appear that the bankrupt's current position is any better than it was at the date of bankruptcy.

¶ 26 As well, it seems to me that bankrupt's motivation in seeking the annulment of the bankruptcy is the fact that the trustee has obtained the proceeds in the Ameritrade account, a step with which the bankrupt disagrees. In *Re Baker*, [1997] M.J. No. 564, (October 20, 1997), Man. Q.B., Registrar Lee held that motions to annul should be brought immediately. The learned registrar said:

"If the bankrupt had wished to have the filing of the assignment vacated based on her contention that the trustee submitted the assignment in error and contrary to her instructions, she should have brought the motion to do so immediately. The bankrupt did nothing until after she had run into a disagreement with the trustee concerning a particular aspect of the administration of the estate some four months after the bankruptcy had commenced."

¶ 27 In my view, this motion is prompted by the bankrupt's disagreement as to ownership of the Ameritrade account.

¶ 28 Lastly, the non-disclosure of the Ameritrade account by the bankrupt suggests to me that the bankruptcy should continue to permit the trustee to investigate the affairs of the bankrupt. It seems to me that such investigation would be beneficial to the general body of creditors and would advance the integrity of the bankruptcy system.

¶ 29 For these reasons, the motion is dismissed.

¶ 30 As to the alternative relief sought on the motion, that aspect of the motion is dismissed without prejudice. It seems to me that there has been insufficient evidence put forth to persuade me that a substitution is in order and, in any event, the bankrupt has not filed any evidence that another trustee, acceptable to the court, consents to act.

¶ 31 I may be spoken to regarding the issue of costs, in the event that the parties cannot agree on the same.

REGISTRAR SPROAT

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