IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Moore, Re, 2006 NSSC 216

Date: July 5, 2006
Docket: B 27138
Registry: Halifax

District of Nova Scotia
Division No. 2
Court No. B 27138
Estate No. 51-115889

IN THE MATTER OF THE CONSUMER PROPOSAL OF JOAN MARIE MOORE T/A COLCHESTER AUTO SERVICES/COLCHESTER AUTO BODY

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: March 28, 2006

Counsel: Robert J. McCleave representing Margaret McLellan

Peter Lederman, Q.C. representing the Administrator, Venner & Associates

Introduction and Statement of Facts

[1] This is an appeal of the disallowance by the Administrator of the claim made by Margaret McLellan, of Middle Musquodoboit, in the consumer proposal of Joan Marie Moore, made on April 29, 2004.

[2] Joan and her late husband Dale lived in Stewiacke where they had operated an auto body shop.

[3] In June 1996 Dale asked Mrs. McLellan with whom he had been acquainted for some time to lend him money for his business to computerize his shop. He represented that he needed money in order to obtain work underwritten by insurance companies. On June 18, 1996 she loaned him $30,000.00. The money was advanced by a cheque payable to him. He gave her a promissory note, providing for monthly payments without interest of $300.00. There were three subsequent loans:

Date	**Amount**	**Paid to**
May 13, 1997	$25,000	Dale
January 14, 1998	$25,000	Cash
February 24, 1998	$25,000	Dale

[4] Dale later gave Mrs. McLellan a promissory note for $105,000.00, the total of the loans, dated December 31, 1998, which provided for monthly payments of $500.00. The promissory notes were each given in response to Mrs. McLellan asking for something to evidence the debt. The business was registered on March 15, 1995, under the *Partnership and Business Names Registration Act*, R.S.N.S. 1989, c. 335, with the name " Colchester Auto Services" in Joan's name as sole partner. This is the name reported on her income tax returns. However, the business was also known as "Colchester Auto Body", a name which had not been registered. Cheques used to make payments to Mrs. McLellan were those of Colchester Auto Body on a CIBC account. Also an account statement with the name "Colchester Auto Services" with the Toronto Dominion Bank was put in evidence. It showed both Dale and Joan's names under the business name.

[5] She thought the money was lent to the business and not Dale personally. As she said on the stand, "Why should I pay his bills?" However, she received no confirmation that anything specific was done with the money.

[6] Income Tax Returns for both Joan and Dale for the years 1996, 1997, and 1998 show that the only income for Dale was a disability pension from the Canada Pension Plan of $7,815, $9,788 and $9,789 for those years respectively. They show for Joan for 1996, employment income of $21,634 against which was claimed a loss of $9,266 from the business; for 1997 employment income of $8,849, other income of $2,993, Employment Insurance of $3,607, RRSP redemption of $2,203, against which was claimed a loss of $15,632 from the business; and for 1998 no income from employment is shown and for the business a loss of $11,638 is reported. The result is that Dale and Joan had a combined income after taking into account the losses from the business for 1996 of $20,183, for 1997 of $11,808, and for 1998, a net loss of $1,849.

[7] In each year as part of Joan's return there is a Statement of Business Activities. It is basically a statement of income and expenses. The 1996 statement shows under the heading: "Details of equipment additions in the year", the following:

Tools & Equipment	$7,456
Office Equipment	425
Vehicles	6,627
Building	20,281

$34,789

No apparent extra expenses are noted.

[8] In the 1997 return note is made of supplies of $31,420.63 as an expense. In 1998 supplies are $33,895.22. Nothing is claimed under additions in either of these years. In contrast the claim for supplies in 1996 was $6,231.15. The gross incomes for these years were respectively $137,211.80, 112,438.46 and 180,315.99.

[9] Payments on account of these loans had been made with some regularity in 1999, 2000 and 2001. They were by way of cheques drawn on Colchester Auto Body which had been variously signed by Joan or Dale, and by direct deposits of cash to Mrs. McLellan's bank account. Again the depositor's initials on the deposit slip submitted in evidence have been variously "JM" or "DM", presumably being those of Joan or Dale. They have been for amounts of $500, $650 or $1,000.

[10] The payment schedule was $300 per month beginning in July 1996. After the third loan the payments were increased to $500 per month and from

August 2000 the payments were $650. A total of $32,750 was repaid. This leaves a balance of $72,250. No payments were received subsequent to Dale's death on January 16, 2002.

[11] Mrs. McLellan gave evidence of her contacts with the Moores. She said they visited her every Sunday from 1996 until Dale's death. Sometime in the course of this relationship they offered to make her a partner in the business. They often spoke of the business as "our business". Mrs. McLellan drew the inference that the business was jointly owned. The visits were opportunities to exhibit to Mrs. McLellan the deposit slips confirming payment on the loan, to apologize for being late, to profusely express gratitude for the loan, assure payment of interest, etc.

[12] Joan only repudiated the loans after Dale's death. Before, she had joined Dale in the representations that it was their business and that Mrs. McLellan would be paid.

[13] Mrs. McLellan had commenced an action against Joan personally and as executrix of Dale's estate for the outstanding balance in December of 2002.

With the filing of Joan's proposal it was stayed.

[14] The reason for disallowance of the claim is stated in the Notice of Disallowance as follows:

> There is no evidence within the proof of claim that Joan Moore has signed any promissory note or in any other way undertaken the debt on a personal basis or authorized any party to incur the debt on her behalf.

[15] This may well have been a reasonable response by the Administrator to what was presented with the claim. However, there is now before the Court significant documentary evidence, Mrs. McLellan's two affidavits, her cross examination thereon and an affidavit of Joan which was filed the day before the hearing. All these documents give a much more detailed picture than what was before the Administrator.

[16] The response to this appeal by Joan is by way of an affidavit dated March 24, 2006 and filed the day before the hearing. I quote material parts of it:

> 2. I only became aware of my late husband's borrowing from the Appellant in late 1997. I do not know what he did with the money that he borrowed. I do know that it was not used in my business and I do not believe that it was used to support our life style. We were able to make ends meet during the late nineties with our

> respective incomes.
>
> 3. My late husband ceased to be actively involved in the business in the mid nineties because of ill health. I was administrator of the business and employed various auto body mechanics to actually do the work required. My late husband did retain signing authority on the business chequing account. I acknowledge now as I did then that the money owed to the Appellant was a legitimate debt incurred by my late husband, and I am well aware that repayment was made from my business account. This account was our only source of revenue but these payments were not related to the business. I did not tell the Appellant that her money was used to help computerize the business.

[17] Joan did not attend the hearing and thus was not available to be cross examined. Counsel were content to proceed without her being present.

Analysis of Facts

[18] The case put by Mr. McCleave for Mrs. McLellan is that she was lending money jointly to Joan and Dale for the use of their business, or simply to the business, a business which according to the registration under the *Partnership and Business Names Registration Act* was Joan's business, she being the sole partner. Dale was in this regard acting as her agent. She was the principal. What was done by the agent is binding on the principal.

[19] In my analysis the question I first ask is to whom was the loan made. The

evidence before me is not complete. All I have from Joan is her brief affidavit, the material parts of which are quoted above. If she had been cross examined, I do not know what would be revealed. However, I must construct the best picture of what happened I can from the evidence.

[20] The Moores had a very modest business, a losing business. Obviously they were struggling. Dale was suffering from sufficient disability to be entitled to a CPP pension. Joan had income from other work. They put the business in her name. She denied knowing what Dale did with the money. However, she acknowledged being aware of the borrowing in late 1997. She very much participated in the repayments. The cheques all came from her business. If it was not her loan, why did she make this money available from her business? The financial statements for the business suggest extensive losses but also extensive payments for equipment and repair. Where did the money come from?

[21] Joan and Dale were regular in visiting Mrs. McLellan. They wanted to make her a partner. What interpretation should one put on this? Was it to assure her continuous generosity?

[22] Their total net income during each of the three years was very small. $20,183 in 1996, $11,808 in 1997, and a net loss of $1849 in 1998. The $34,789 spent in 1996 for equipment addition as reported in Joan's income tax return did not come from the cash flow of the business. It must have come from the first loan. They might well have been able to get by on $20,183 of income in 1996. However, they could not do so on $11,808 in 1997, or on a loss of $1849 in 1998. They must have been living off the loans these two years. Accordingly I do not accept Joan's assertion that she was ignorant of the use of the money.

[23] Dale did the negotiating with Mrs. McLellan. He was speaking for himself and Joan, or for the business; it does not make much difference. The entire behavior of Joan is more consistent with her seeing that she was responsible for these loans. She was behaving in a manner consistent with being jointly liable and not one who was not privy to the loans.

[24] I think viewing the evidence as a whole, the inference to be drawn on balance is that Dale and Joan were working together to acquire this money.

She knew what was happening form the start. Dale spoke for himself and for Joan from the start. He was her agent. Therefore they were jointly liable. It was her loan as much as his. She would now be liable. The claim is a proper claim in her proposal.

Agency by Ratification

[25] To come to this conclusion I have given a rather simply analysis of the facts and of agency law. However a more theoretical alternative approach with the same result I would base on agency by ratification.

[26] Joan by her conduct ratified what Dale had done on her behalf or on behalf of the business. Ratification is an act by a principal after the agent has acted with the third party, whereby the principal confirms that what the agent did at the time without authority of the principal, is now binding on the principal: GHL Fridman: The Law of Agency, Sixth Edition, discusses agency resulting from ratification in Chapter 5 beginning at page 74. Let me quote what is said about the requirements of ratification on page 75:

> In *Firth v. Staines* Wright J gave three conditions that had to be satisfied to constitute a valid ratification. First, the agent whose act is sought to be ratified must have purported to act for the principal. Secondly, at the time the act was done the agent must

> have had a competent principal. Thirdly, at the time of the ratification the principal must be legally capable of doing the act in question. This analysis brings out the four features of ratification which are important: the principal's position; the agent's intentions; the legal quality of the act done by the agent; and the time when ratification takes place.

[27] These conditions are present. Dale did make it clear to Mrs. McLellan that he was borrowing for the business, which for practical purposes was really himself and Joan. They were both competent and at the time were legally capable of borrowing money.

[28] The act of ratification was by implication. This is explained at page 93:

> It has already been seen that the relationship of principal and agent can be created, before the agent acts on behalf of the principal, by a contract or other agreement which is implied from the conduct of the parties. Such a relationship may arise subsequent upon the agent's acts from conduct on the part of the principal showing clearly that he has approved and adopted what has been done on his behalf.
>
> The principal must do some positive, unequivocal act which indicates ratification.

By her various acts Joan showed she approved and adopted what Dale had done on her behalf.

[29] I find therefore that the repayment of the loan is a proper claim in her

proposal.

Interest

[30] The Applicant asks that interest be allowed on her claim pursuant to paragraphs (i) and (k) of Section 41 of the *Judicature Act*, R.S.N.S. 1989, c. 240, which say:

> (i) in any proceeding for the recovery of any debt or damages the Court shall include in the sum of which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal.
>
> (k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> (i) interest is payable as of right by virtue of an agreement or otherwise by law, ...
>
> (iii) the claimant has been responsible for undue delay in the litigation.

[31] The evidence is that there never was any agreement that interest would be payable, either at the time money was advanced or later.

[32] Joan and Dale apparently had offered to pay interest. However, Mrs. McLellan was happy just to receive the monthly payments on principal. I take the discussion about paying interest as only an expression of their

willingness to pay it, if necessary, to keep Mrs. McLellan happy, but was with the hope she would not insist on it. Accordingly Mrs. McLellan is not alleging a right to such interest. Rather she is only asking for pre-judgment interest under the *Judicature Act* from the time of the breach, that is, when payments stopped and only at the discounted rate provided under Rule 31.10(2) of the Civil Procedure Rules, that is, 2½ % per annum.

[33] Prior to the amendments to the *Judicature Act* providing the award of pre-judgment interest, in claims of debt, unless there was an agreement providing for the continual accrual of interest, a plaintiff could not recover judgment to reflect what she has lost in not having the money available for other uses. This amendment provides for compensation by way of interest from the time the debt was due until judgment. After judgment the plaintiff is entitled to interest under the *Interest on Judgments Act,* R.S.N.S. 1989, c. 233.

[34] However, I do not think that in the circumstances pre-judgment interest should be allowed.

[35] The right to pre-judgment interest only accrues when the Court gives judgment in the claim. Before then, it simply does not exist and is not actionable. Parties in settling claims often make allowance for pre-judgment interest but this is by agreement knowing that it would likely be awarded if the matter proceeded to trial and judgment. I do not think it is for the Court in these circumstances to allow now for proof of what can only legally accrue through the issuing of a judgment by the Supreme Court. This has not and will never take place.

[36] Accordingly I disallow the claim for pre-judgment interest.

Costs

[37] The Applicant asks for the costs of the action in the Supreme Court to the date it was stayed by the filing of the consumer proposal. The authority on this point is clearly stated in Paragraph G§28(18)(a) of *Houlden & Morawetz's Annotated Bankruptcy and Insolvency Act* which I quote:

> Plaintiff's Costs
>
> If an action is brought against the debtor before bankruptcy and the debtor goes into bankruptcy before judgment is given against him or her, the costs are regarded as an addition to the sum recovered

> and are provable, provided the claim is provable: *Re British Gold Fields of West Africa Ltd.*, [1899] 2 Ch. 7, 68 L.J. Ch. 412, 6 Mans. 234 (C.A.).

[38] Cost should be allowed as they would have been, if the matter had been discontinued or settled on the date of filing the consumer proposal. This is covered by Tariff C, in effect at the time of the filing of the proposal, under Rule 63 of the Rules of Civil Procedure. It provides that upon the discontinuance or settlement of a claim specific amounts may be allowed for specific items and where the amount exceeds $5000.00, a further amount up to a certain maximum may be allowed.

[39] I do not have the particulars of the proceedings before me. However, I understand there was a significant effort made to obtain bank documentation. Costs are ultimately a matter of discretion for the Court (Rule 63.02, Civil Procedure Rules). I set the costs to be added to Mrs. McLellan's claim at $2,000.

Conclusion

[40] The appeal of Mrs. McLellan of the disallowance of her claim is granted.

The Administrator is directed to allow her claim of debt in the consumer proposal in the total amount of the loans, $105,000, less the payments received, $32,750, that is, $72,250, together with the addition of $2,000 for costs, for a total of $74,250.

[41] If costs are sought I shall hear the parties.

R.

Halifax, Nova Scotia
July 5, 2006