IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: George (Re), 2008 NSSC 304

Date: October 17, 2008
Docket: B 31998
Registry: Halifax

District of Nova Scotia
Division No. 02 - Truro-Pictou
Court No. 31998
Estate No. 51-976030

IN THE MATTER OF THE BANKRUPTCY OF JUSTIN THOMAS GEORGE

- and-

IN THE MATTER OF THE APPLICATION OF THE BANKRUPT FOR DISCHARGE PURSUANT TO SECTION 169 OF THE *BANKRUPTCY AND INSOLVENCY ACT*

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: July 30, 2008

Counsel: Pamela Clarke representing the Bankrupt, Justin Thomas George

Colin D. Piercey representing The Workers' Compensation Board of Nova Scotia

Mark Rosen representing the Trustee, BDO Dunwoody Goodman Rosen Inc.

[1] The Bankrupt, Justin Thomas George, made an assignment on July 10, 2007. He now asks for an absolute discharge. His principal creditor, The Workers' Compensation Board of Nova Scotia (WCB), holds a judgment against him, which with accrued interest totals $1,931,290.63. It objects to him being discharged without conditions.

[2] Mr. George is 45 years of age. No evidence was given of his education or early work experience. However, it appears he had some limited experience in property development and the mortgage brokerage business. There is no evidence of his ever having meaningful success.

[3] He comes from an Antigonish family and he has nine siblings. His father died a few years ago. He lives with his mother who is 80 years of age. He had been working in the southern United States in the 1990's. However, he came home to help his parents.

[4] His mother owns property in or near Antigonish. Over the years she with his father and now she alone has been subdividing lots from the property and selling them as residential building lots. He helps his mother by showing

lots, running errands, doing household chores, etc. She provides him with room and board and the use of her automobiles. He receives no particular salary for his efforts. However, she provides him with expense money. There is suggestion that his siblings also help him.

[5] The event which gave rise to this judgment is described by Mr. George in paragraph 2 of his affidavit of July 25, 2008, which I quote:

> On or about August 1, 1990, I was involved in a single motor vehicle accident (the "accident"), in which I have been advised and do verily believe that John Cameron was injured. At the time of the accident, I was driving a motor vehicle owned by Margaret Connolly, with the consent of her daughter, Angela Connolly, who has use of the vehicle. The motor vehicle accident happened during a hurricane, with very heavy wind and rain. While operating the motor vehicle, I believed that a branch had struck it, and I got partially out of the motor vehicle and looked around. I did not see that I had struck anything, so I got back into the motor vehicle and continued on. Only later did I become aware that I had apparently struck Mr. Cameron. In my good faith belief, I was exercising due regard for safety concerns while operating the motor vehicle.

[6] An action (1996 S.AT. No. 01027) was commenced in this court by Mr. Cameron against Mr. George, Mrs. Connolly and her insurer. The originating documents in this action had not been served personally on Mr. George. Apparently an order for substituted service had been granted, as Mr. George had been out of the country at that time. The matter came before

Justice Scanlan in November of 1996. Mr. George was not present nor represented at this trial. Apparently he did not have notice of the trial. The issue was simply whether Mr. George was using the car with Mrs. Connolly's consent. Justice Scanlan found that he did not have her consent and therefore dismissed the action against Mrs. Connolly and her insurer.

[7] I was not provided with details of how the amount of the judgment was determined. I presumed default judgment was entered against Mr. George and damages were assessed. The WCB, having taken responsibility for Mr. Cameron's compensation, by way of subrogation became entitled to the benefits of Mr. Cameron's judgment. Mr. George never took any action to have the judgment set aside.

[8] Justice Scanlan's decision was submitted to me and is part of the record in this application. The other evidence of what happened that day is in Mr. George's affidavit referred to above and his cross examination at the hearing.

[9] I shall summarize the evidence I think is relevant to the issues before me:

Margaret Connolly was the owner of the 1983 Chevette driven by Mr. George on the day of the accident. Mrs. Connolly had two daughters, Kim Perro and Angela Connolly. She let her daughters use the car, but under very strict conditions:

- they were to have specific permission;
- they were not to be under the influence of alcohol, not to take the car to bars or other places where alcohol was to be consumed, and not to lend the car to anyone;
- Angela was not to drive at night; and
- the permission to one did not mean permission to the other.

That day Kim had borrowed the car on the understanding that she would use it to go to her home and then to work. Kim without permission from her mother allowed Angela to take the car, drop her off at work at 3:00 p.m. and then planned to pick her up at 10:45 p.m. This apparently was the first violation of their mother's rules.

After dropping Kim off at her work Angela returned to her home which she shared with Kim and Lynn Grant. Sometime later Mr. George arrived at their home with a bottle of wine which the three of them drank. They proceeded then to a local lounge. Drinks were ordered.

A half hour later or more Mr. George asked Angela for the use of the car to "go see a friend". She gave him the keys, told him not to tell anyone and further stated that Kim would be "wild" if she found out that Angela had lent him the car. Mr. George said he would only be gone a few minutes.

When it came time for Angela to pick up Kim, Mr. George had not returned with the car. Somehow Kim located Angela at the lounge. Shortly thereafter Mr. George arrived and advised that he had "hit something". They then went to the scene of the accident. Mr. George resisted Kim's intention to tell the police of the involvement of the car and threatened her that he would tell the police that she had been driving, if she told the police of the involvement of the car.

The car was then taken to Mr. George's garage where he and a friend replaced the windshield which had been broken in the accident. It was several weeks later that Mrs. Connolly learned of the involvement of her car in the accident.

[10] No criminal charges were laid against Mr. George regarding his behavior up to the point of the collision. However, he was charged with and convicted of leaving the scene of an accident with intent to avoid liability. He served a period of incarceration.

[11] Mr. George's counsel submits that his discharge should be governed by Subsection 172(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. He has no surplus income; he had not been bankrupt before; there is no proof of any facts referred to in Section 173. So there is no reason not to grant him an absolute discharge.

[12] Counsel for the WCB submits that there are several facts proved under that section and that his discharge is governed by Subsection 172(2).

[13] Specifically counsel refers to the following facts in Subsection 173(1):

(a) assets being equal to less than fifty cents on the dollar,

(b) omitting to keep books of account,

(c) continuing to trade,

(n) making a viable proposal, and

(o) failure to perform.

[14] I do not think that any fact mentioned in paragraphs (b), (c) , (n), and (o) was proved.

[15] As to (b), Mr. George had not been carrying on a business except possibly two failed businesses on the South Shore, which have no connection with the debt which caused the bankruptcy. I do not see that it is made out that he has failed to keep books appropriate to his circumstances.

[16] As to (c), there is authority that it only applies to traders, that is, business people who buy and sell goods with a view to profit - *Re Breti* (1999), 14 C.B.R. (4th) 35 (Sask. Q.B.). I do not think it applies to Mr. George.

[17] As to (n), Mr. George has had little, if anything, which could be called income. Considering the amount of the judgment and considering the attitude of the WCB in dealing with him at the discovery and in the cross examination, I think it is very doubtful that he could have put forth a

proposal which would both be accepted by the WCB and be performed by him.

[18] As to (o), it was not put to me that Mr. George has in any significant way refused to perform his duties as a bankrupt.

[19] It remains for me to consider (a), the fifty cents on the dollar matter.

[20] Clearly, his assets are not of a value equal to fifty cents on the dollar. The burden is then on him to show that this situation "has arisen from circumstances for which the bankrupt cannot justly be held responsible". *Samson* v *Alliance nationale* (1935), 17 C.B.R. 304 (Que, CA)

[21] What have the courts said about justly being held responsible for debts? The leading case in this context is *Kozack* v *Richter*, 20 C.B.R. (N.S.) 223, a decision of the Supreme Court of Canada. The debt of approximately $14,000.00 resulted from a motor vehicle accident caused by the "wilful and wanton misconduct" of the bankrupt.

[22] Pigeon J. adopted the following position expressed in a number of earlier cases, namely that:

> . . . the *Act* was never intended to enable a judgment debtor to get rid of a judgment for damages and with no other purpose to serve than the convenience and comfort of the debtor. (paragraph 6)

[23] The court determined that the bankrupt would have to pay approximately half the judgment before being discharged, notwithstanding that he was a wage earner with a family with limited income. In paragraph 5, Pigeon J. said, referring to Section 172:

> . . . I cannot agree that the proper application of the provisions above quoted should result in a plaintiff making no recovery for personal injuries caused by gross negligence. It would mean that motorists in respondent's situation would be able to tell such a claimant: "There is no use suing me, if you lose you will have to pay the costs, if you win I will make an assignment in bankruptcy and you will get nothing."

[24] A number of cases have followed *Kozack*. *Phillips, Re*, 32 C.B.R. (4th) 294 (N.S., Registrar Hill) concerned a bankrupt who was involved in an accident while driving without insurance. Judgment Recovery (N.S.) Limited paid the claim and took judgment against him. Two years later he was involved in an accident causing serious injury to a passenger. He then had neither license to drive nor insurance. Again Judgment Recovery paid the claim and took judgment against him.

[25] In this decision Registrar Hill noted a decision of Goodfellow J. of this court, *Diamond, Re*, 2002 NSSC 31, which confirmed the applicability of *Kozack* in Nova Scotia for circumstances of this nature. Registrar Hill also referred to an earlier case he had decided, *Re Edwards*, [1992] N.S. J. No. 294 and quoted in paragraph 8 the following from his earlier case:

> It seems that some of the cases state that where the bankrupt does not have the means to pay or some future prospects of meeting the terms of a conditional order such an order should not be made. The proposition is that the Court should not focus entirely on the bankrupt's tortuous conduct, but must consider his financial and other relevant circumstances. There are other cases that might be said to stand for the proposition that a conditional order should be made even absent the ability to pay where an assignment has been made to avoid payment of a judgment or debt arising from tortuous conduct.

and added in paragraph 9 the following:

> In my view, I should not allow the statute to be used as a mechanism to avoid responsibility for what clearly was irresponsible conduct. At the same time, it is appropriate to keep in mind the rehabilitative purpose of the legislation. No two cases will be identical, and the court will need to find a correct balance between these competing principles in each case.

[26] *Graham, Re* (1992), 16 C.B.R. (3d) 58 (BC SC) concerns a bankrupt who was found liable by a civil jury for damages for sexual assault. These damages constituted a major portion of his unsecured liabilities. Because of the peculiar tortious nature of the assault he was required to pay a substantial

portion of his unsecured debts.

[27] In reviewing the evidence, there are a number of acts on Mr. George's part which concern me and are clearly relevant to the determination I am called to make.

[28] Earlier in the day of the accident he had been socializing with Mrs. Connolly's daughter Angela and Lynn Grant and they had shared a bottle of wine with Mr. George. After this they went to a lounge where drinks were ordered. There is no evidence how much was consumed nor by whom. Thus we do not know of Mr. George's condition. I have to give him the benefit of doubt.

[29] It is clear that Mrs. Connolly imposed strict conditions on her daughters respecting the use of the car. I think it is a fair inference from the evidence that Mr. George was aware of this and should have realized that there was something wrong about Angela allowing him to take the car. Angela had told him that he was not to tell anyone and that Kim would be "wild" if she were to know that Angela had lent the car to him. It was thus made

abundantly clear to him that for one reason or another he should not have taken the car. I think it can be said that Mr. George should be deemed to know that he was taking a car which effectively was uninsured. He was, in my view in just as bad a position as the bankrupt in *Phillips, Re* who drove a car without insurance and without a license to drive.

[30] When he returned to the lounge he admitted he hit something. They went to the scene and he resisted Kim's intention to get out of the car and tell the police. He threatened her that he would tell the police she had been driving.

[31] He then took a course of action to hide the damage from Mrs. Connolly and Kim, and Angela gave their mother a false explanation, no doubt under pressure from Mr. George.

[32] His actions, beginning with requesting the use of the car, show serious irresponsibility on his part. His irresponsibility is shown even more clearly in what he said himself in paragraph 2 of his affidavit quoted in [5]. He hit and very severely injured Mr. Cameron, but he explained the event simply as having been struck possibly by a branch. He said that he "got partially out

of the motor vehicle and looked around". That is all he said he did, notwithstanding the collision cracked the windshield. Mr. Cameron could not have fallen far from the car. Either Mr. George responded with a completely inadequate search in the circumstances, or he saw Mr. Cameron and decided to run from and cover up what had happened.

[33] No criminal charges were laid against him respecting the actual collision. Nothing turns on this. However, he was convicted of leaving the scene of the accident and served a term of imprisonment.

[34] He acted irresponsibly first in borrowing the car, when he knew or should have known that Angela could not give him the requisite consent. Once the accident happened, the entire course of action was to avoid responsibility, to hide the damage from Mrs. Connolly, and to hide from the police. To do so he bullied Kim and Angela.

[35] Considering the turpitude of his behavior on the whole, I am satisfied that Mr. George cannot meet the burden of proof that this debt has arisen from circumstances for which he cannot justly be held responsible.

[36] A fact under Subsection 173(1) has been proved. The disposition of this application is governed by Subsection 172(2).

[37] Before considering the conditions under which Mr. George may be discharged, I must consider the alternative remedy sought by counsel for the WCB.

[38] Considerable documentary evidence regarding Mr. George's financial dealings was presented and he was extensively cross examined, the object being to show that he was not as impecunious as he wanted to be believed.

[39] Also the WCB had examined him in aid of execution in December 2006. The WCB framed its objection in the alternative that further examination or discovery be ordered. The WCB had during the course of administration procrastinated respecting its declared intention to take certain proceedings, that is, apply to have the bankruptcy annulled and pursue formal examination. It waited until the discharge application was scheduled to take specific steps. Notice was only given at the last moment.

[40] I do not think that there is much likelihood that anything would be discovered by further examination which would have a material effect on the question now before me, that is, what is to be ordered pursuant to Subsection 172(2). That part of the WCB's Notice of Objection is therefore dismissed.

[41] Limited evidence has been given of Mr. George's life. There are many unanswered questions. Counsel elected not to delve very far. However, it is clear that he has not been successful in establishing himself so as to make through work a reasonable living. His few business ventures have not been successful. He is at the mercy of his mother and siblings. He has not been employed in recent years. I do not see him being in a position in the near future of having any money to pay into his estate. However, considering the cases mentioned, with behavior like his in the context of the accident, inability to pay does not preclude a condition of discharge being the payment of a sum of money.

[42] A suspension will not make any significant difference to him. I see nothing I can do to rehabilitate him. In keeping with the cases and considering his serious lack of responsibility, the integrity of the bankruptcy system requires

that he not wholly escape responsibility for this debt. Mr. Cameron's being looked after by the WCB does not help Mr. George's situation. The loss is ultimately being born by the employers of Nova Scotia.

[43] In his present situation being discharged or undischarged may not make much difference to him or to the WCB. What is important is that should he come into an amount of money, his estate should have reserved for it the right to take such money. This can be accomplished by him consenting to judgment. It must be for a significant amount.

[44] I determine that Mr. George shall be entitled to his discharge upon his consenting to a judgment in favour of his Trustee in the amount of $100,000.00.

[45] There will be no costs.

R.

Halifax, Nova Scotia
October 17, 2008