IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Gardner (Re), 2010 NSSC 298

Date: July 27, 2010
Docket: B 34208
Registry: Halifax

District of Nova Scotia
Division No. 01 - Halifax
Court No. 34208
Estate No. 51-1171299

In the Matter of the Bankruptcy of Audra Grace Gardner

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: May 12, 2010

Counsel: D. Bruce Clarke, Q.C., representing the bankrupt.

Pamela Clarke, representing the National Bank of Canada.

Peter Wedlake, representing the Trustee, Green Hunt Wedlake Inc.

Background

[1] Dr. Audra Gardner made an assignment in bankruptcy on February 27, 2009. She now is applying for her discharge. The total of her debts exceeds $250,000, of which $170,000 is owed to the National Bank of Canada. The bank opposes her discharge.

[2] She completed her undergraduate degree at Dalhousie University in 2000 and applied for admission to its medical school. She was not immediately accepted, so she embarked on a masters degree. She was accepted into the medical school in the fall of 2002 and had an arrangement to complete her thesis work for the masters degree the following summer. Shortly after commencing the third year she found she could not continue. However, she was able to resume her studies the following September. She completed the MD degree in 2007. She then enrolled in the Family Medicine Residency Training Program at Dalhousie University.

[3] The court was provided with a letter dated March 31, 2010 from her family physician, Dr. Karen Prokai. It gives an account of Dr. Gardner's studies and health over the past ten years. It is consistent with the evidence Dr.

Gardner gave at the hearing. I am taking the liberty of quoting it in its entirety.

March 31, 2010

To Whom it May Concern:

Re: Audra Gardner DOB Nov 7/78

I have been Audra Gardner's family physician since 1999, when she was still an undergraduate student at Dalhousie University. It was January 2000 when Audra first sought medical attention for depressed mood. She was diagnosed with major depression and started on medication. Audra was on medication from January 2000 until May 2002.

Audra began medical school in September 2002 and presented in November 2002 with depressive symptoms. Audra self-referred to Counseling Services to help deal with the stressors of medical school and successfully completed her studies over the next year.

By November 2003, despite counseling and self help techniques, Audra was restarted on medication and some adjustments to treatment were made over the next 8 months. Audra continued her studies throughout this period.

In September 2004, in her third year of medical school, Audra was not able to function effectively in her program due to recurrent major depression. It was decided with the school's advisors to take a leave of absence with the intention of returning in September 2005.

During Audra's medical leave she attended regular counseling/psychotherapy sessions and continued her medication. There was an immediate improvement in her mood once she was removed from the medical school environment.

Audra returned to school in September 2005 with anxiety that waxed and waned, but she was able to complete the remaining months of medical school.

Audra was accepted into the Dalhousie Family Medicine Program

that commenced in July 2007. Unfortunately, by September 2007 Audra's depression symptoms recurred with significant anxiety to the point of panic requiring her to take another leave from September 2007 to December 2007. A return to the residency work place was attempted in January 2008, but Audra had no option but to leave the work place 2 weeks later due to an exacerbation of her depression with anxiety.

Audra remained on medical leave from January 2008 until August 2008. Her medical leave was endorsed by me and her attending psychiatrist at the time. On Audra's re-entry into the residency program her psychiatrist outlined specific guidelines and restrictions for a gradual return to the work place. Despite these measures Audra's second return to the Family Medicine Program only lasted from August 2008 to October 2008 due to overwhelming anxiety and depression. Audra had no choice but to leave the program once again with the intention of returning in December 2008. Unfortunately, Audra has not sustained a remission of her major depression with anxiety to allow a third attempt to returning to the residency program.

Audra's recurrent major depression with anxiety has been exacerbated by the fact that Family Medicine is a high stress occupation. Long hours, sleep deprivation, lack of structure, unpredictability and lack of routine are all part of the Family Medicine training program. All of these factors are detrimental to Audra's mental health.

It is quite clear that Audra has had multiple attempts at re-entry into the Family Medicine training program and with each attempt Audra's success in sustaining a return has lessened. Medically it is recommended that Audra seek retraining or employment in a less demanding, more structured field, or work environment in order to maximize her chances of maintaining the mental health gains made thus far.

Sincerely,

Karen Prokai, MD, CCFP

KP.als

[4] The Court was also provided with a letter dated May 4, 2010 from Dr.

Joanne Gusella, a clinical psychologist, practising in Halifax. She advises that Dr. Gardner has been her patient since November 20, 2007. She recommends that they meet bi-weekly. Her hourly fee is $160.00.

Financial Arrangements

[5] Dr. Gardner initially had a line of credit with CIBC. However, on the advice of a financial advisor with the Canadian Medical Association she made a new arrangement with the National Bank in January 2006. It provided for a line of credit with a limit of $120,000. She drew upon it to pay off her indebtedness to CIBC of $100,000. This line of credit is especially designed for medical students. It contemplates that the maximum amount increases each year while students complete their education. They are then expected to make regular payments to retire the loan over a reasonable period of time as their practices develop.

[6] Dr. Gardner's line of credit was increased to $150,000 in September 2006 and to $170,000 in April 2007.

[7] In August 2007 her drawings had exceeded $170,000. She applied in

December 2007 to have the maximum increased to $180,000. The bank granted this increase in exchange for her husband, whom she had married in 2004, being added as a co-borrower.

[8] In November 2008 she applied to have her husband removed as a co-borrower. The bank granted her a new line of credit without him as a co-borrower upon a $10,000 lump sum payment being made.

[9] The National Bank filed an affidavit by Eric Champagne, who is a Banking Products Associate, dated May 10, 2010. It reviews the history of Dr. Gardner's dealings with the bank as outlined above. In paragraphs 17, 18 and 19 he states that she did not at any time throughout her relationship with this bank reveal anything of her medical conditions or of her taking leaves of absence. It only became aware of them when it received Dr. Prokai's letter quoted above. Let me quote paragraph 19:

> Had the Bank known of the extent and effect of Dr. Gardner's depression and anxiety, it would not have agreed to remove her husband as co-borrower from the Line of Credit and grant her a new line of credit in her name alone.

[10] The suggestion is that Dr. Gardner was not frank with the bank regarding her

circumstances at the time she negotiated the current line of credit. However, Mr. Champagne was closely cross-examined on this point.

He was asked: "So, what do you say she did wrong -- anything?"

He replied: "I am not saying she did anything wrong".

[11] A major concern on the part of the bank in perfecting its file for the new line of credit was to have confirmation that Dr. Gardner was registered in the residency program. This she was. There is no evidence that she was asked any questions, a proper response to which would require her to disclose that she was on a leave of absence. She had returned to her studies after set-backs before, and had every intention of doing so again. I do not think, particularly considering Mr. Champagne's response mentioned immediately above, that anything should be made of whether or not she should have disclosed this.

[12] I should note that the reason Dr. Gardner wanted her husband removed as a co-borrower was that, because of it, he was having difficulty obtaining credit for his own purposes. They have since separated.

[13] Any suggestion as to the bona fides of Dr. Gardner making an assignment in bankruptcy I think is answered by her evidence that she had first reviewed her finances with an advisor who works for the Canadian Medical Association. It was this advisor's recommendation that she consult a bankruptcy trustee.

[14] Dr. Gardner presently receives monthly payments of $2,578.00 from the disability insurance she has through the medical profession. She faces a dilemma. If she takes employment outside the professional work that qualifies her for this insurance, she will not be able to carry such insurance. If she has a relapse she will have no source of income.

[15] The Amended Section 170 report indicates that Dr. Gardner does not have any surplus income.

Positions of the Parties

[16] Dr. Gardner's counsel submits that she should receive an absolute discharge.

[17] Counsel for the bank strongly argues that she should be required to pay a

significant amount, such as $40,000, in recognition of the factors which have been identified in the case law respecting loans of this type.

[18] The Trustee recommends that the application be adjourned for two years. This will allow appropriate time to better determine what the future may hold for Dr. Gardner, particularly with respect to her health. Her finances would be monitored during that period and the Trustee would then be in a better position to make a recommendation.

Law

[19] The National Bank lists several grounds for opposing Dr. Gardner's discharge. Only one was seriously argued before me. I need only consider it.

[20] It is submitted that there is a fact proven under Subsection 173(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*), namely:

> (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

If such is substantiated, it says that her discharge must follow the directions of Subsection 172(2) which gives me authority to require her to make a substantial payment as the condition of her discharge.

[21] These lines of credit are granted to enable the debtors to acquire professional educations. The banks have no security. All they have is the good faith of the debtors that they will diligently complete their programs, establish their practices, make reasonably good incomes and pay off the loans in a reasonable time.

[22] The argument is that, if they become bankrupt and their assets are not of a value equal to fifty cents on the dollar, but they have established themselves as may reasonably be expected, they should have difficulty convincing a court that they cannot justly be held responsible for their circumstances.

[23] I reviewed this type of loan and cases dealing with such in some detail in *Watkins (Re)*, 2009 NSSC 35. I quote paragraphs [12] to [17]:

> [12] *Re Swerid* (2007), 35 C.B.R. (5th) 316 (Man., Q.B.) concerned a bankrupt who at 43 had accumulated debts totalling $76,000 and was in his third year in law school. He sought an absolute discharge. He was not sure he wanted to practice law, and was interested in alternative and less lucrative

careers. Registrar Cooper observed at paragraph 22.

> Mr. Swerid, having obtained his law degree, should have the potential to earn a substantial income. It may be that his bankruptcy may make him a less attractive candidate for articling positions, but the fact of bankruptcy in itself would not preclude him from articling or practicing law, although it may result in some restrictions related to trust accounts. If he chooses a less lucrative career path, his creditors should not have to suffer for this personal choice. In my view, in these circumstances, where the bankrupt is on the verge of being able to earn substantial income, a conditional discharge is appropriate.

[13] He was required to pay $30,000 into his estate as the condition of his discharge.

[14] *Dolgetta (Re)* (2008), 46 C.B.R. (5th) 1206 (Alberta, Q.B.) concerns a student who was working on both an MD and a PhD, in the midst of which and following personal difficulties owed a bank $150,000. With two degrees she had good future earning potential. Registrar Hanebury observed at paragraph 47:

> The evidence indicates that Ms. Dolgetta is seeking to avoid payment to her primary creditor, the Royal Bank. The integrity of the bankruptcy system requires that, in the facts of this case, this not be allowed to occur. Ms. Dolgetta hoped to obtain two degrees while most students were obtaining one. Her personal situation resulted in an adjustment to her timing. This is not a reason to permit her to graduate almost debt-free, while other students will be shouldering heavy debt loads as they commence their medical careers. Public confidence in the bankruptcy system would be diminished.

Her discharge was made conditional on her consenting to a judgment in favour of her trustee for the amount owed to the bank.

[15] *Insley (Re)* (2007), 43 C.B.R. (5th) 56 (Sask., Q.B.) involves a recent

graduate from medical school who owed creditors $258,000 in unsecured debt. The trustee had recommended that she pay $8,000 to obtain her discharge. The line of credit giving rise to this indebtedness was used to finance her education. While she was a student she was to make monthly payments of interest and was to pay principal and interest on graduation. The line of credit began with a limit of $20,000, but during the course of her education had crept up to $193,475. Payments of interest became unmanageable. She compounded the problem with cash advances from the bank on her VISA. On graduation she enrolled in a two year residency at a modest stipend, but with expectations of significant earnings upon completion and a year or two to build up a practice. Registrar Schwann commented, at paragraph [47]:

> She acquired exactly what she bargained for for - financial support for the purposes of acquiring a long term, durable asset . . . .

[16] She was required to consent to judgment for $193,000, the approximate amount of her student line of credit.

[17] What one has in the present case and in the cases reviewed is a peculiar line of credit offered by banks to help students finance expensive and long periods of university education to qualify for a profession. The loans are granted on the understanding that with successful completion of the education the borrowers will be able to make good incomes which will enable them to repay the loans over a reasonable period of time as they establish their practices. A creditor cannot realize on an education. The only security the bank has is the borrowers' good faith that they will complete their studies, and qualify for and establish their professional practices. I presume most of these arrangements are successful. Students graduate, are successful and pay the loans. For those students who for various reasons face misfortunes and do not establish a lucrative practice, the remedy of bankruptcy is for them often appropriate. However, it should not be used by those who are successful or have good expectations of being successful as an easy way of eliminating their education debts.

Counsel brought to my attention other cases. I shall review the following:

[24] In *Re Shin* (2009), 55 C.B.R. (5th) 118 (Ont., Dep. Reg. Mills) the bankrupt

who owed a bank a substantial amount borrowed to finance her medical education had been injured in a bicycle accident. The injuries had prevented her from completing her studies. It was uncertain at best whether she would ever be able to complete her training. She was granted an absolute discharge.

[25] In *Brunt (Re)* (2006), 246 N.S.R. (2nd) 276, I granted an unconditional discharge to the bankrupt. She had trained as a teacher, but was unable to find permanent employment. She had medical problems, and she needed to care for her children, one of whom had medical problems that required her continuous attention. There was some hope that in time she would be able to teach, but it was unlikely she would be able to do so until her children grew up.

[26] Also in *Abdo (Re)*, 2009 NSSC 338 I granted a discharge to the bankrupt. He had been indebted to a bank with a loan arrangement similar to that of Dr. Gardner. He had dropped his studies in engineering because of health problems, the seriousness of which he refused to recognize. I concluded that the prospects that he would ever be able to make any meaningful payments were slim. Furthermore he had not pursued his education far enough to have

what would be considered an asset.

[27] *Stoski (Re)* (2009), 51 C.B.R. (5th) 40 (Manitoba , Reg. Harrison) was a discharge application for a recently qualified dentist who owed a substantial amount used to finance her education. She had experienced some health problems while in dental school. She was having difficulty establishing her practice. The court was concerned with her difficulty in focusing on establishing her practice. Her debts totalling over $300,000, $243,000 of which were borrowings to finance her education. She was required to pay $150,000 over six years as a condition of her discharge. It should be noted that, in contrast to Dr. Gardner, notwithstanding her health problems she was able to practice.

[28] *Chow (Re)* (1989), 73 C.B.R. (NS.) 225 (Sask., Barclay J.) concerned a lawyer who was indebted to Revenue Canada for $321,550.20 (eight years of unremitted income tax). His income and expenses were considered at length as were the responsibilities generally of self-employed persons. It was found he had financial ability to make payments and was required to pay $36,000 as the condition of his discharge.

[29] I shall simply quote a few lines from *Pelletier, Re* (1998), 5 C.B.R. (4th) 267 (Sask. Registrar Herauf):

> 10 As a general rule I strongly believe that bankrupts in this type of situation receive a long term asset by virtue of their education and should be expected to pay for this asset through long term payments. See *Umpherville, Re* (1995), 35 C.B.R. (3d) 281 (Sask. Q.B.) and *Pitzel, Re* (1995), 36 C.B.R. (3d) 42 (Sask. Q.B.). This principle is even more relevant when the bankrupt's employment is directly tied to the education received as a result of student loan funding.
>
> 11 However, this general principle must also be subject to a thorough review of the bankrupt's personal and financial situation. I am not convinced after a careful review that the bankrupt's circumstances are such that a conditional order can be accommodated.

Analysis

[30] My view is that, if Dr. Gardner can show her illness is going to prevent her from making use of her education, being that which she acquired with the loan, and from being able to make a meaningful contribution to her estate, she has met the burden of showing her indebtedness has arisen from circumstances for which she cannot justly be held responsible, and she should be granted an absolute discharge. Most borrowers complete their education, establish their practices and pay their loans. However, there are some who meet misfortune and are unable to pay their loans. It is for them that we have the *BIA*. The banks know that this happens. Nevertheless they take the risk.

[31] Can I make a finding in this regard? The evidence I have before me is Dr. Prokai's report, Dr. Gusella's brief note and what Dr. Gardner said at the hearing. It is clear that Dr. Gardner is not able now to continue in her residency program. This she recognized by resigning from it effective May 1, 2010. She has not worked since October 2008. Dr. Prokai recommends that she seek retraining or employment in a less demanding environment. She is faced with a dilemma about seeking employment outside the medical community.

[32] Put simply can she have any reasonable expectation of being able to be earning an income sufficient enough to address a requirement to pay a meaningful amount to her estate? This is just another way of asking whether her health will improve in the foreseeable future to allow her to be well employed.

[33] Her health problems became evident eleven or more years ago. Her condition has become worse with each set-back. She has not been able to work for a year and a half. Her physician says that she has to find something

else to do. We do not know what she might be able to do. The history shows that her condition is deep-seated.

[34] It might have been helpful if additional medical evidence looking at her future had been produced, such as from a psychiatrist. One can only speculate on what that might have been. Maybe little concrete could be said. However, with what is before me, it is clear that she is not going to be able in the reasonably foreseeable future to resume the residency program, otherwise practice medicine nor be otherwise employed in sufficiently lucrative work so as to be able to make meaningful payments to her estate. Put simply the circumstances giving rise to her financial situation are that she has had serious health problems going back eleven or more years which have resulted in her being unable to use that which was acquired with her borrowings. Today she and her advisors have little idea as to whether she will in the reasonably foreseeable future or ever be able to practice medicine or otherwise be gainfully employed to the extent that she could make meaningful contributions to her estate. These are circumstances for which in my view she cannot justly be held responsible.

[35] Her situation is very different from that found in *Watkins, Swerid, Dolgetta, Insley, Stoski*, and *Chow*. These persons were all able to work in the fields for which they were educated with the money they had borrowed. Their financial problems arose not from health problems but from poor financial management, lifestyle, unreasonable expectations, etc. Her situation is more akin to that in *Shin, Brunt,* and *Abdo.*

Conclusion

[36] No fact under Subsection 173(1) has been proved. I am governed by Subsection 172(1). She presently has no surplus income, only modest disability payments. No purpose would be served by refusing or suspending her discharge or adjourning this application to see what happens.

[37] She is entitled to an absolute discharge.

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

R.

Halifax, Nova Scotia
July 27, 2010