SUPREME COURT OF NOVA SCOTIA
Citation: *Barkhouse (Re)*, 2018 NSSC 101

Date: 20180426
Docket: Hfx, No. 472745
Registry: Halifax

In the Matter of The Bankruptcy & Insolvency Act, RCS. 1985, c. B-3, as amended

Applicant

And in the Matter of the Bankruptcy of Robert Wade Barkhouse

Respondent

Judge:	The Honourable Justice Christa M. Brothers
Heard:	March 8, 2018, in Halifax, Nova Scotia
Decision:	April 26, 2018 in Halifax, Nova Scotia
Counsel:	Tim Hill Q.C., for the Applicant Cory J. Withrow, for the Respondent

By the Court:

Background

[1] The applicant, Rexel Canada Inc. (carrying on business as Liteco)("Rexel") has applied pursuant to section 43 of the **Bankruptcy and Insolvency Act,** RSC 1985, c. B-3 ("**BIA**") for:

1. an order adjudging Robert Wade Barkhouse ("Barkhouse") a bankrupt; and
2. a bankruptcy order in respect of the property of Barkhouse.

[2] Rexel claims it supplied goods to Barkhouse for a variety of both large and small projects and invoices for those goods remain unpaid.

[3] The basis for the motion is summarized as follows by the applicant:

1. Barkhouse has at some point during the six months preceding the filing of the application carried on business.
2. Barkhouse is indebted to the applicant in the sum of $514,450.30.
3. Mr. Barkhouse is also indebted to the applicant in the sum of $65,770.72 plus prejudgment interest.
4. Barkhouse has committed an act of bankruptcy as of December 31, 2017, ceasing to meet his liabilities as they became due.

Applicant's Position and Evidence

[4] In support of the application, Rexel filed an affidavit of Leona Penney who is the Regional Credit Manager of Rexel. In her affidavit, Ms. Penney deposes that Rexel supplied goods to Barkhouse, who was carrying on business as R. W. Barkhouse electrical contracting. Ms. Penney deposes at paragraph 7:

> 7. The records of Rexel indicate that as of August 29, 2014, $514,450.30 was outstanding and payable by Barkhouse in respect of the Project, and the entire amount is still outstanding, plus pre-judgment interest, as of the date hereof.

[5] Ms. Penney deposes that Barkhouse sought credit to purchase supplies from Rexel for work his company was performing on a school in New Glasgow.

[6] On October 17, 2017, Rexel commenced a Builders Lien Action against the Attorney General of Nova Scotia, Dora Construction Limited and Barkhouse (the "School Action"). This action has been defended by Barkhouse.

[7] In addition, on June 14, 2016, Rexel commenced an action against Barkhouse (the "Debt Action") seeking payment of $65,770.72 with regard to outstanding unpaid credit accounts.

[8] Ms. Penney attached an account a Exhibit "C" to her Affidavit. These purport to be four accounts which are the subject matter of the Debt Action. Ms. Penney claims no defence was filed in relation to the June 14, 2016 action.

[9] The applicant argues that s. 42(1)(j) of the **BIA** applies as the respondent has committed an act of bankruptcy because he "cease(d) to meet his liabilities generally as they became due". The applicant relies on the affidavit of Ms. Penney as the sole evidence of this indebtedness. In particular, the applicant says the respondent is indebted in the amount of $65,770,72 as per the Affidavit of Verification.

[10] In addition at paragraph 13 of her affidavit Ms. Penney deposes:

> 13. I am informed by Tim Hill, Rexel's solicitor, and verily believe, that there are a number of judgment (*sic*) registered against Barkhouse on the Property Online Registry, listed as follows:

Date	Judgment Creditor	Amount
October 28, 2015	Royal Bank of Canada	$56,949.17
February 22, 2016	WESCO Distribution Canada LP	$11,366.48
February 25, 2016	Canadian Imperial Bank of Commerce	$153,506.31
April 14, 2016	Canada Revenue Agency	$23,457.89

Respondent's Position

[11] Mr. Barkhouse defends the application and states:

1. Mr. Barkhouse does not owe a debt of $1,000.00 or more to Rexel as of the date of this application.

2. Mr. Barkhouse has not committed an act of bankruptcy within the six months preceding the filing of this application.
3. Even in the event Rexel is able to demonstrate that this is a proper case to issue an order pursuant to s. 43 of the **BIA**, it is a complete answer to the application for Mr. Barkhouse to show that he is able to pay his debts, as per s. 43(7) of the **BIA**.
4. Any alleged indebtedness to Rexel is the subject of two ongoing and disputed court proceedings namely Hfx. No. 432442 (the "School Action") and Hfx. No. 452445 (the "Debt Action").

Law and Analysis

[12] Rexel relies on section 43(1) of the **BIA** which provides:

> **Application for Bankruptcy Order**
>
> **Bankruptcy application**
>
> 43 (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that
>
> > (a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and
> >
> > (b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.
>
> . . .
>
> **Affidavit**
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> (3) The application shall be verified by affidavit of the applicant or by someone duly authorized on their behalf having personal knowledge of the facts alleged in the application.
>
> . . .
>
> **Place of filing**
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> (5) The application shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.
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> **Proof of facts, etc.**
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> (6) At the hearing of the application, the court shall require proof of the facts alleged in the application and of the service of the application, and, if satisfied with the proof, may make a bankruptcy order.

> **Dismissal of application**
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> (7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.
>
> **Dismissal with respect to some respondents only**
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> (8) If there are more respondents than one to an application, the court may dismiss the application with respect to one or more of them, without prejudice to the effect of the application as against the other or others of them.
>
> **Appointment of trustee**
>
> (9) On a bankruptcy order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court considers just, to the wishes of the creditors.
>
> **Stay of proceedings if facts denied**
>
> (10) If the debtor appears at the hearing of the application and denies the truth of the facts alleged in the application, the court may, instead of dismissing the application, stay all proceedings on the application on any terms that it may see fit to impose on the applicant as to costs or on the debtor to prevent alienation of the debtor's property and for any period of time that may be required for trial of the issue relating to the disputed facts.

[13] Barkhouse states that Rexel has not provided sufficient evidence to prove:

(a) a debt owing of $1,000.00; and

(b) an act of bankruptcy within the preceding six months.

Proof of a Debt

[14] Subsection 43(1)(a) of the **BIA** requires proof a creditor has debts owing of at least $1,000.00.

[15] Rexel claims there are two debts owing, a debt of $514,450.30 and $65,770.72.

[16] The first sum is the subject matter of a claim by Rexel against Mr. Barkhouse, Hfx. No. 432442, known as the School Action.

[17] The School Action is an ongoing proceeding which has not been determined by the Court. However, questions of law have recently been determined by

Robertson, J. in *Liteco v. Nova Scotia (Transportation and Infrastructure Renewal)*, 2017 NSSC 304.

[18] Robertson, J. characterized the facts in the School Action as follows:

> 4 Dora was the general contractor for the construction of a Junior High School in New Glasgow, located at 93 Albert Street. Barkhouse, completed the electrical contract for Dora on the project and received all of its materials from the Plaintiff, Liteco, as required to carry out its contract.
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> 5 On condition of supplying the materials, Liteco required a Joint Cheque Payment Agreement signed by Barkhouse and Dora, where in all funds payable to Barkhouse for the projects were to be issued by Dora as joint cheques to Barkhouse and Liteco.
>
> 6 The affidavit of Jamie Miles dated October 16, 2017, outlines the arrangement at para. 10 and Exhibit "T".
>
> 7 The affidavit of Robert Barkhouse dated August 20, 2017, indicates that $1,379,072.60 was paid by Dora to Barkhouse for his project work (paras. 13 and 14). From those funds $743,422.58 was paid by Barkhouse to Liteco.
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> 8 Liteco allocated a significant portion of the project funds received from Barkhouse to unrelated accounts between Barkhouse and Liteco for other projects, instead of applying the funds to the accounts relating to the project. (See Miles affidavit of October 16, 2017, para. 11 and Exhibit "U"; and Leona Penney's affidavit dated October 23, 2017, Exhibit "F".)
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> 9 By the time Dora terminated Barkhouse, alleging poor workmanship and delay, Liteco had received hundreds of thousands of dollars from Dora, through Barkhouse and the accounting reveals that Liteco was paid more than it supplied to the project. Liteco attributed only a small portion of the funds they received to the invoices relating to materials provided to the project.
>
> 10 Claiming it was unpaid on the project, Liteco liened the project lands, forcing Dora to post security to remove the liens. Dora says it has had $600,000 sitting in court since 2014.

[19] In making legal determinations pursuant to Rule 12, Robertson, J stated:

> 27 In the circumstance of this case I accept that there is a sufficient scaffold of undisputed relevant facts to allow consideration of the two questions of law to be answered by the Court.
>
> 28 With respect to Question No. 1, the answer is no. Notwithstanding the assignment, which Liteco did not insist upon adherence to, Dora is not liable to pay the assignee Liteco in the circumstances. Dora has actually paid Liteco in full and has been paid more than the amount of the invoiced materials supplied.

> 29 With respect to Question No. 2, the answer is also no. Liteco appropriated payments to satisfy older unrelated accounts in circumstances where the funds were impressed with a Trust pursuant to the Builder's Lien Act, s. 44B(1) and (2).

[20] Consequently, the issue of what amounts are owing to Rexel are not proven as the action has been defended. Barkhouse argues, given the decision of Robertson, J., that Rexel has been paid for all supplies used on the school project and there is no debt owing or, at the very least, this alleged debt has far from been proven.

[21] The other debt claimed of $65,770.72 is the subject of a second action, Hfx. No. 452445, known as the Debt Action. Barkhouse has filed a defence to that action. In the Debt Action, Rexel claims that Barkhouse, carrying on business as R.W. Barkhouse Electrical Contracting, owes money for a debt resulting from the supply of materials under credit accounts numbered 44172, 44173, 44174 and 44223.

[22] Ms. Penny's affidavit attaches invoices allegedly owing by Barkhouse. These invoices are purportedly sent from Rexel to Barkhouse. These invoices do not indicate what the charges are in relation to. There are no descriptions of supplies or services listed in any of these invoices.

[23] Barkhouse filed an affidavit dated March 2, 2018. Barkhouse deposes:

> 25. I have had little time to review the Rexel statements supporting the Second Action included in the affidavit of Leony Penny (sic). However, upon reviewing the statement reprint for "PAD 5 MARSHALLS" that totals $21,137.01 (attached as Exhibit "C") (the "New Statement") and comparing it to the original statement I was provided by Liteco attached hereto as Exhibit "8" (the "original Statement"):
>
> > (a) the customer number in the New Statement is different than that in the original Statement;
> >
> > (b) the "Reference 2" section, which describes the location or description of the work, has been deleted or redacted from the New Statement but appears in the Original Statement;
> >
> > (c) the majority of the "reference 2" entries in the Original Statement relate to a job for "David's Bridal; and
> >
> > (d) all amounts relating to the David's Bridal job I completed in 2014 have been paid.

[24] When one compares the invoice in the Barkhouse affidavit to Invoice 44223 in the Penney affidavit, similarities are apparent aside from the lack of description of the job done or supplies furnished.

[25] The Barkhouse affidavit was unchallenged on cross-examination. Barkhouse states the invoice was paid. Barkhouse says these invoices relate to work in relation to David's Bridal and all invoices for that job have been paid. However, the invoices submitted by the applicant purport to be in relation to Pad 5 Marshalls.

[26] Counsel for the applicant acknowledged the discrepancies between the older invoice in the Barkhouse affidavit and the invoice in the Penney affidavit. The Court was advised that Rexel changed its invoicing system. This was offered as a possible explanation for the differences in the invoices, although counsel for the applicant candidly said he was not certain.

[27] The unchallenged Barkhouse affidavit raises a *bona fide* defence to these alleged debts that require determination.

[28] While the applicants are concerned about priority, given the decision of Justice Robertson in *Liteco*, *supra*, where the applicant was unsuccessful in maintaining a lien, the applicant must satisfy me, on this application, of the facts as alleged. I am not satisfied, based on the evidence provided, that the debts have been proved. The respondent has raised a *bona fide* defence.

[29] The applicants have said in total $580,221.02 is owing from Barkhouse. Yet in the School Action, the decision of Robertson, J. was that $743,422.58 was paid by Barkhouse to Liteco.

[30] As stated in *Houlden & Morawetz Bankruptcy and Insolvency Analysis*, *The Bankruptcy and Insolvency Act* at Ds28:

> If the debt on which the application is founded is disputed, and the court after hearing the evidence is satisfied that the dispute is *bona fide*, it will usually adjourn or stay the application to permit the parties to settle the dispute in the ordinary civil courts.

Conclusion

[31] The respondent has raised a *bona fide* dispute and defence to the allegations that monies are owing to Rexel. The applicant has not shown, by evidence adduced in this application, that it is owed $1,000 by the respondent and consequently has not meet the test in s. 43(1)(a) of the **BIA**. These remain uncertain or unproven claims.

[32] In addition, evidence provided on this application does not demonstrate Barkhouse committed an act of Bankruptcy within six months preceding this application or that Mr. Barkhouse cannot pay his debts.

[33] I refer to *Wooltex Recycling (Can.) Ltd.*, Re., 1985 CarswellOnt191(ONSC) at para 14-15

> 14 Fluke made very little personal investigation of the affairs of Wooltex and it would seem that Mr. Foxcroft may have been advised to launch a bankruptcy petition in preference to proceeding in the ordinary courts. Over and over again it has been necessary to say that the bankruptcy court ought not to be used as a collection agency. It is recognized that it is an attractive route because it provides a speedy and often effective method of acquiring control over the assets of the debtor and also provides information and in some cases remedies that may be unavailable to a judgment creditor.
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> 15 Nevertheless, it should be remembered that bankruptcy or a threat of bankruptcy is a very serious matter. It is a threatening experience for a company to be exposed to the possibility of destruction. The purpose of this bankruptcy legislation is to provide a means whereby people who are in difficulties may resolve those difficulties and, on the other hand, where it is clear that a business can no longer continue, to provide an orderly method of distributing whatever assets remain available for the creditors. It is my view, speaking for myself, that the practice of launching a petition should be treated as a serious matter and should only be initiated in what appears to be a very clear case.

In order to be successful, there must be a clear case on the evidence adduced. There is not.

[34] Consequently, the bankruptcy application is stayed pursuant to s. 43(10) of the **BIA** pending the outcome of the School Action and the Debt Action.

[35] If the parties cannot agree on costs, I will accept written submissions.

Brothers, J.