SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Card (Re)*, 2024 NSSC 74

Date: 20240315
Docket: 45640
Registry: Sydney
Estate Number: 51-2961808

In the Matter of: The bankruptcy of Brandon Christopher Card

DECISION

Registrar:	Raffi A. Balmanoukian, Registrar in Bankruptcy
Heard:	January 23, 2024, in Sydney, Nova Scotia
Counsel:	Calvin DeWolfe, for the Applicant, Continental Shed Rentals Inc. Hilary Gilroy for the Respondent Trustee, Rita Anderson & Associates Inc. Brandon Christopher Card, not appearing

Balmanoukian, Registrar:

[1] A popular 1992 novelty song proposed, among other endeavours, that "if I had a million dollars, I'd build a tree fort in our yard." Mr. Card, having no such resources, financed his. Then he went bankrupt.

[2] The structure, which was actually a lofted playhouse (but referred to in argument and documentation as a shed; I will adopt that nomenclature) was duly delivered and installed, and the loan documentation executed. It is not claimed to have been affixed to land to such an extent that it ceased to be a chattel; the applicable law is that of personal property, not realty. Old Hickory of Canada ("Old Hickory") manufactured, sold, and delivered the shed. The loan, in the form of a lease that I shall discuss, was with Continental Shed Rentals Inc. ("Continental"). I will refer to this as the "loan," or the "lease," interchangeably. The agreement was dated February 2, 2023.

[3] Five months later – and three months or so after going into default under the loan, Mr. Card went bankrupt[1]. It is also not disputed that Continental did not register its security under the *Personal Property Security Act*, SNS 1995-6, c. 13,

[1] Default: May 1, 2023; date of notice of default / "expiration notice": May 12, 2023; date of bankruptcy, July 4, 2023.

as amended (the "PPSA") until after the bankruptcy. The Trustee disallowed its claim as a secured creditor (allowing it as unsecured); against that, the lender appeals pursuant to s. 135 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA").[2] It did so within the prescribed time, and all parties agree the matter is properly before me for adjudication. Each party filed an affidavit, on which there was no cross-examination, and comprehensive briefs. Counsel, both of whom are comparatively junior associates at respected firms, are to be commended for their professionalism, efficiency, preparation, and courtesy.

[4] The loan is actually in the form of a month-to-month lease[3]. There is an option to buy at any time, in which case 45% of the payments to date are applied against the principal balance, and the option price is what is left (subject to various sundry charges and adjustments, generally payable at the time incurred). After 60 months, 45% of all contractual payments would equal the amount financed – although technically the lease would continue on a month-to-month basis, there would be no reason for the payor to continue that arrangement.[4]

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[2] Although the Claim was filed in Form 74, and Continental pleads and in part relies on s. 81 BIA, the disallowance is pursuant to s. 135 BIA. There was no dispute that this disallowance was properly issued, nor that the appeal citing BIA ss. 67, 81, and 135 was properly effected.

[3] I note for completeness of record that the documentation has, in paragraph 18, a jurisdiction clause applying federal and Ontario law. Both parties agreed that nothing turns on this, vis-à-vis applying Nova Scotia PPSA legislation to this case, and its interface with the federal BIA.

[4] The lease called for monthly payments of $451.05, tax-included. After 60 months, if all payments were made on time, the total paid would be $27,063. 45% of that is $12,178.35, being the cash price of $10,590 plus 15% HST, with a small rounding error in favour of the lender.

[5] Under Section 2(H) of the loan agreement, Mr. Card "will not have legal title or an equitable interest in the property, unless and until [he] acquires ownership in accordance with this paragraph" (which set out the option above).

[6] When Mr. Card defaulted, Continental sent a "expiration notice" dated May 12, 2023. It states that "Your prior rental agreement has expired and your storage shed has been scheduled for pick up." It further provides for a "Rent and Reinstatement Required" of $942.35[5], together with various other potential repossession charges. It states "[c]ontact us immediately if you would like to renew your rental term." It does not have an expiry date by which the addressee must do so, with at least the implication that such could be effected prior to repossession (again, impliedly with any additional accrued rent charges and expenses). The lease itself, by contrast, provides for a 30 day reinstatement period if the lessee "has voluntarily surrendered the Property to Lessor,"[6] but is silent on reinstatement rights if that surrender (or repossession) has not taken place[7].

[7] The shed was never repossessed, and although apparently in a known location, as of hearing remained in the possession of the bankrupt.

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[5] While not broken down, this appears to be two lease/loan payments of $451.05, plus a $35 "rental reinstatement" fee, outlined both in the expiration notice and in clause 2(G) of the loan, plus tax on the $35.
[6] Lease Paragraph 7
[7] Other than to say, in paragraph 5, that "rent" accrues in the event of non-renewal by the lessee in any particular month.

[8] When Mr. Card filed his bankruptcy, the shed was listed as a $3,000 asset with no associated security. For whatever reason, Continental was not listed as a creditor at all.

[9] Continental filed a financing statement under the PPSA on October 31, 2023. It filed Form 74 dated November 9, 2023, as a secured creditor, claiming "that property and all interest or rights in it," pursuant to the purchase agreement with Old Hickory, and the loan agreement with Continental.[8]

[10] The Trustee admitted the claim as unsecured, taking the position that "No….PPSA registration….at the date of bankruptcy…..PPSA Registration…….was registered after the date of filing and therefore invalid." Against this, Continental appealed.

[11] Continental takes the position that, by reason of the default and lease "expiry" notice, the bankrupt had *no* property interest in the shed as at the bankruptcy, and thus there is nothing "captured" as "property" within the meaning s. 67 of the BIA to vest in the Trustee pursuant to s. 71 BIA. Continental goes on to say (in part) that the failure to perfect its security interest is only relevant when

[8] Form 74 is a Reclamation of Property; it is in this instance however entitled "Proof of Claim" which is the citation for a Form 31. This was treated as, and in evidence referred to as, a proof of claim, and was disallowed and appealed as such.

there are competing claims, which it says does not apply here. Finally, it says that s. 81 BIA governs, and that it is entitled to property that is in possession of the bankrupt, within the meaning of that section by virtue of having proven its claim thereto.

[12] The Trustee says this is an instance of applying the decision of this Court in *Re Baker*, 2022 NSSC 123 (in which Ms. Gilroy appeared as co-counsel for the unsuccessful party). Continental, in argument, conceded (and I agree) that the loan agreement in issue here is a "financing lease" rather than a "true lease," should I conclude that registration/perfection is determinative of the case at bar[9].

[13] The question is therefore whether Mr. Card had any "property" in the shed that would vest in the Trustee, pursuant to s. 71 BIA, such that the purported security against that property was ineffective as against the Trustee for non-perfection under the PPSA; or whether, if Mr. Card had no property rights at all, Continental was the sole legal and beneficial owner of all property attributes appurtenant to the shed.

[14] I have concluded that Mr. Card was not, for PPSA and BIA purposes, devoid of all rights as against the shed as at the time of his bankruptcy. Those rights

[9] For a discussion of "true lease" versus "financing lease," see *Baker*, *supra*, at paras. 12-24.

vested in the Trustee. Continental's purported security is ineffective as against the Trustee, it being conceded that the security was (a) not perfected at the time of bankruptcy and (b) a "financing lease" that secured payment of an obligation and not a "true lease." Accordingly, the Trustee's disallowance was valid and this appeal should be dismissed.

[15] To recap Continental's position: it bases its submissions on the premise that, at bankruptcy, Mr. Card had no property rights in the shed at all, and that the failure to perfect the lease by registration does not change that.

[16] I agree with part of Continental's starting proposition that only the bankrupt's property vests in the trustee – as will appear, I disagree that this is also where the proposition ends. Validly secured creditors are unaffected (subject to issues of preferences and eve-of-bankruptcy transactions under s. 95 BIA, which do not arise here). Continental is also correct when it says that the lease was valid as between debtor and creditor, without perfection. Finally, Continental is also partially correct in saying that "[s]ecurity interests are relevant only to resolve competing entitlements to the same property." However, it is incorrect when it goes on to say that there were no such competing entitlements here at bankruptcy, because of Mr. Card not having any "legal or equitable interest…..whatsoever."

[17] There were, indeed, "competing entitlements to the asset," at bankruptcy. There may have been none between Continental and Card. There may also have been none between competing creditors. There were (and are) as between Continental and the Trustee.

[18] The Trustee-creditor competition is clearly contemplated by the PPSA s. 21(2):

> (2) An unperfected security interest in collateral is not effective against
>
> > (a) a trustee in bankruptcy if the security interest is unperfected at the time of the bankruptcy;

[19] Put another way, an unperfected security interest that is valid as between debtor and creditor is "not effective" as against the Trustee, and in that respect the Trustee is in a superior position, with respect to that asset, to that of the debtor. Recall, again, that it is conceded that if I determine that the debtor had property in the shed, the lease is a "security interest" as contemplated by the PPSA. So while it is correct, as a starting point, to say that the bankrupt's property vests in the Trustee, it is not correct to say that is also the ending point. There may well be situations, such as with an unperfected security interest, in which the Trustee stands in a superior position to the bankrupt, vis a vis the creditor respecting that interest.

[20] Continental also concedes that "property," for BIA purposes, is an expansive definition, and includes "any type of property……present or future" (BIA s. 2) Continental goes on to cite *Re Giffen* [1998] SCR 91 for the proposition that the "right to use and possession….constitutes 'property' for the purposes of the BIA and the trustee, by virtue of s. 71(2) of the BIA, succeeds to this proprietary right" (*Giffen,* para. 34). However, again, Continental seeks to distinguish the case on the basis that Mr. Card had no right to use and possess the shed.

[21] That is where we differ.

[22] There is no dispute that Mr. Card was in default. However, that did not extinguish all of his property rights, at least not prior to a pre-bankruptcy repossession that did not take place (and as of post-bankruptcy hearing had not taken place). Mr. Card had a right to reinstate under para. 7 if he "has voluntarily surrendered the Property to Lessor" (which is not the case here) and was also provided under the "expiration notice" with the opportunity to "retroactively reinstate [his] contract as of [his] prior expiration date" upon payment of certain sums[10]. That notice did not contain a deadline for its exercise. It inevitably follows that Mr. Card was not devoid of any rights with respect to the shed, and

[10] Bilbro affidavit, Tab B

had "property" upon his bankruptcy which vested in the Trustee. *All* of Mr. Card's property rights vested with the Trustee: *Ramgotra v. North American Life Insurance Co.*, [1996] 1 SCR 325. With the lease not perfected and having the status of a "security interest," Mr. Card's property was supplemented by Continental's interest being ineffective as against the Trustee. The claim to the contrary by Continental was what was properly disallowed.[11]

[23] Finally, I agree with the comment in *National Bank of Canada v. Merit Energy*, 2001 CanLii 61013 (Alta. QB) at para. 29 that "….termination of a security agreement does not cure the lack of perfection under the PPSA. Only the filing of a financing statement or possession of the collateral can perfect the interest, provided that either occurs prior to bankruptcy."[12]

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[11] Many Nova Scotia solicitors of different vintages will have been immersed in the concept of property as comprising a "bundle of sticks" representing rights, privileges, powers, and immunities, an analogy espoused by Dalhousie's legendary late Professor Peter Darby and similarly enunciated in Ziff, *Principles of Property Law*, 7th ed. (Toronto: Thompson Reuters, 2018) at pp. 2-5, in turn citing Prof. A.M. Honore, "Ownership" in *Making Law Bind* (Oxford: Clarendon Pr. 1987), at p. 165. Applying this analysis, Mr. Card was not devoid of "all of his sticks" at the time of bankruptcy. He had some, namely the right of reinstatement, and Continental had others which, by virtue of an unperfected security interest, was valid as against Mr. Card but not as against the Trustee. See also MacDougall, *Canadian Personal Property Security Law* (Toronto: LexisNexis, 2023) at pp. 31-2; Cuming, Walsh, and Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2022) at pp. 587-9.

[12] I was provided with 2002 ABCA 5 as a brief dismissal of an appeal in that case. That report is not an appeal from the same case but instead is an appeal of 2001 ABQB 583, a different matter and a different topic. it is noted in apparent error in CanLii as being linked, and indeed is an appeal from the same Justice. I do not import anything negative towards counsel as a consequence.

[24] Accordingly, and to summarize, Mr. Card did have "property" in the shed as of the bankruptcy; and although the loan was valid as between him and Continental, it was ineffective as against the Trustee.

[25] Continental goes on to submit, however, that its claim under s. 81 BIA is dispositive of its claim, and priority. It acknowledges that it has the burden of proof, to a civil standard (s. 81(3) BIA). It submits that, having filed a proof of claim and having provided the evidence called for in that section, it is entitled to the shed. It says that this section operates independently of the PPSA or a requirement for a perfected security interest under that Act.

[26] Respectfully, this is circular reasoning. It is correct that Continental has submitted a proof of claim and gave its reasons for asserting its claim to property. Doing so does not create a right which otherwise would be ineffective or is ineffective as against the Trustee. It is a methodology by which the claimant can, to a civil standard, seek to prove its claim to property; thereupon, it is admitted or disputed.

[27] This is adequate to dispose of the appeal. However, it is worth noting that this situation is precisely that which the PPSA seeks to address through its perfection mechanisms. It avoids the perception that a debtor is more affluent than

in reality by virtue of having possession of assets secured by loans that cannot be determined by a public records search, to the potential detriment of the diligent but unsuspecting creditor.

[28] No explanation was provided why Continental did not perfect its security prior to bankruptcy. It certainly had the sophistication and wherewithal to do so. For that matter, no explanation was provided why it did not effect repossession for the three months between default and bankruptcy. There are no equitable considerations which could weigh in Continental's favour, if such had relevance.

[29] The appeal is dismissed. If counsel cannot agree, I will receive written submissions as to costs within 30 days of release of this decision, of no more than 10 double-spaced pages each (exclusive of authorities).

Balmanoukian, R.