1997 CarswellAlta 1213, (sub nom. Naumczyk (Bankrupt), Re) 214 A.R. 362

Naumczyk, Re

In the Matter of the Bankruptcy of Mary Agnes Naumczyk

Dr. Gary Fong, Creditor of the Estate of Mary Agnes Naumczyk, Bankrupt, Applicant and Fred Kuberko, Elizabeth Kuberko and Alexander Naumczyk, Respondent

Alberta Court of Queen's Bench

McIntyre J.

Judgment: June 18, 1997
Docket: Calgary BK01-054104

Counsel: *Vivian Kolias*, for Applicant.

KPMG, as Trustee in bankruptcy of Mary Agnes Naumczyk.

D. Bruce Hepburn, for Elizabeth Kuberko, Frank Kuberko.

*Richard Alan **Low***, for Alexander Naumczyk.

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — What constituting preference — Whether transaction occurring in debtor-creditor relationship

Debtor was ordered to pay unsecured creditor costs as result of unsuccessful litigation — Debtor subsequently declared bankruptcy — Debtor transferred money to her mother and to bank before bankruptcy to satisfy debts — Unsecured creditor applied for declaration that transfers were fraudulent transactions — Application was dismissed — Debtor was able to meet her debts as they came due — There was no debt owed to unsecured creditor at time transfers were made — Debtor was not insolvent when transfers were made.

Cases considered by *McIntyre J.*:

King Petroleum Ltd., Re (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) — distinguished

Principal Group Ltd. (Trustee of) v. Anderson (1994), 29 C.B.R. (3d) 216, *(*sub nom. *Principal Group Ltd. (Bankrupt) v. Anderson)* 164 A.R. 81, 164 N.R. 81 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — considered

s. 2(1) "insolvent person" [renumbered 1997, c. 12, s. 1] — considered

s. 38 — referred to

s. 95 — considered

APPLICATION by unsecured creditor for declaration that payments made by debtor were fraudulent.

***McIntyre J.*:**

1 On March 14, 1996 Clark J. of the Alberta Court of Queen's Bench dismissed Mary Naumczyk's claim against Dr. Gary Fong for dental negligence. Clark J. stated: "The plaintiff's claim is completely without merit". Naumczyk acted for herself at the trial, although she had counsel earlier in the proceedings.

2 Clark J. awarded Fong party and party costs, including reasonable disbursements and expert fees. Although the costs were not then estimated by counsel it was obvious they would be substantial: Counsel for Fong told the Court that a large amount was incurred for experts; Clark J. told Naumczyk that trial costs are "tremendous".

3 On March 26, 1996 counsel for Fong delivered a draft Bill of Costs to Naumczyk for $25,172.48. On that same date, Naumczyk and her husband Alexander agreed to remortgage their house, which was in both their names. On April 4, the Royal Bank advanced $30,429.44 to them. The amount of $10,943.66 was immediately repaid to the Royal Bank for an amount owing by Alexander Naumczyk on a line of credit in his name. Naumczyk then made two cash withdrawals on April 4 in the amount of $14,500.00 and $4,985.07. Sometime later in April Naumczyk paid $10,000.00 to her parents. This was said to be a repayment of a loan they had made to Naumczyk to finance Naumczyk's daughter's wedding. Naumczyk spent the remainder of the money on house repairs.

4 On April 25, 1996 the Bill of Costs proposed by Fong's counsel was accepted by Clark J., without taxation, in the amount of $25,172.48. This was a contested matter. During the course of argument before me counsel suggested that the Bill of Costs was somehow inappropriate and excessive and that it should not have been accepted in the form proposed. Counsel specifically suggested that fees for experts remaining in Court and listening to the evidence should not have been payable, this being contrary to practice and contrary to the practice of excluding witnesses. On the contrary, I believe it appropriate and important that expert witnesses be allowed to sit in Court during the course of the trial so that they may better assist the Court in providing an opinion.

5 Naumczyk made no payment under the Bill of Costs. On August 12, 1996 (5 months after the trial) she made an assignment in bankruptcy. She listed two debtors: the Royal Bank of Canada for $70,900.00, being the mortgage amount after the refinancing, and thus a secured creditor, and Dr. Fong for his taxable costs - the only unsecured creditor.

6 On April 1, 1997 Master Alberstat authorized Fong to take action directly to set aside the $10,000.00 payment to Naumczyk's parents and the $10,943.66 payment to the Royal Bank. This Order was granted pursuant to Section 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3.

7 Fong then applied pursuant to Section 95 of the *Act* to declare the payment of $10,000.00 to Naumczyk's parents and the $10,943.66 to the Bank to be fraudulent and void. This matter came before me on the ordinary chambers list in Lethbridge. Counsel agreed the matter could proceed by referring to affidavits. Counsel did not cross-examine on affidavits, Naumczyk was not examined by Fong under the *Act*.

8 To succeed Fong must prove:

1. That either payment was made within twelve months of bankruptcy.

2. That Naumczyk was insolvent at the time of the making of the payment.

3. That a preference occurred as a result of the payment; *Principal Group Ltd. (Trustee of) v. Anderson* (1994), 29 C.B.R. (3d) 216 (Alta. Q.B.), Cairns J.

9 In this case, a threshold question is whether Naumczyk was an insolvent person at the time she made the payments. "Insolvent person" is defined in the *Act* as:

> "insolvent person" means a person who is not bankrupt and who resides or carries on business in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

In my view, Naumczyk was not an insolvent person when she made the payments: she was generally able to meet her debts as they came due and indeed her assets, at least as can be inferred from the statement made to the Trustee in Bankruptcy, then exceeded her liabilities. There was no debt to Fong in April when she made the payments to her parents and the Royal Bank, for although Naumczyk was likely to be liable for an amount of costs, that amount of costs had not been ascertained. It was not until April 25, 1996 when Clark J. signed the Bill of Costs proposed by Fong's counsel that a debt arose. Up until the time of the signing of the proposed taxation no debt was in existence - only a contingent or unascertained liability.

10 Counsel for the applicant cited *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.). In my view, that case is distinguishable. Steele J. stated at 80, referring to the bankrupt:

> It had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future.

That statement was apt for the bankrupt in that case but it is not apt to Naumczyk. Ironically, had Naumczyk not refinanced, almost all the equity in the house would have been exempt from seizure pursuant to provincial legislation. Counsel for Fong conceded it would not have been worth pursuing Naumczyk for the paltry equity available after exemption.

11 Therefore Naumczyk was not insolvent when she made the payments. The application fails and is dismissed with costs.

Application dismissed.

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