IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Perry (Re), 2012 NSSC 446

Date: December 20, 2012
Docket: B-36566
Registrar: Halifax

District of Nova Scotia
Division No. 03 - Sydney
Court No. 36566
Estate No. 51-1573473

In the Matter of the Bankruptcy of Darlene Mary Ann Perry

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: November 15, 2012

Counsel: Gavin D. F. MacDonald, representing Seahold Investments Inc.

Darlene Mary Ann Perry representing herself.

Len Shaw representing the Trustee, BDO Canada Limited.

[1] The Bankrupt, Darlene Mary Ann Perry, resides in Sydney. In an action in this Court she alleges that she was injured in a motor vehicle accident on or about August 30, 2006 in which the motor vehicle driven by her was in a collision with one driven by Bernard F. Lee.

[2] The solicitor of record in this action is Derrick Kimball, but it appears that his partner, Nash Brogan, has the carriage of the action. Proceedings have been in abeyance. Medical reports and treatments have not been completed.

[3] In the meantime, Ms. Perry has been borrowing money from Seahold Investments Inc. (Seahold), the Applicant in this application.

[4] Its business is described in the affidavit of its officer, Francine Cormier, on file herein, in Paragraph 4, which I quote:

> Seahold provides financing to individuals with personal injury claims that allows them to access the value of their contingent claim while waiting for the judicial process to be completed. In return for an assignment of the proceeds of a plaintiff's personal injury claim, Seahold loans money to the plaintiff.

[5] During the period from November 5, 2007 to March 12, 2009 Ms. Perry

borrowed in seven separate advances a total of $11,000. The interest thereon is 2.4% calculated monthly or 32.94% per annum. For each advance she signed a note and gave as security an irrevocable direction to pay the amount owing from the proceeds of her claim against Mr. Lee.

[6] Ms. Perry made an assignment in bankruptcy on December 19, 2011. BDO Canada Limited is her Trustee. Her statement of affairs lists five unsecured creditors. Seahold is one. The total unsecured debt is $39,881.88. Of this $31,580.88 is owed to Seahold.

[7] This application was originally brought by Seahold for relief by way of the annulment of Ms. Perry's assignment in bankruptcy or alternatively for a declaration that the directions to pay are unaffected by her assignment in bankruptcy.

[8] The application was originally scheduled to be heard on September 13, 2012 but was adjourned as there was a possibility that Seahold's security could be assured by agreement. However, no agreement was reached. Accordingly the application was again before me on November 15, 2012.

[9] I had in the meantime suggested to the parties that they should consider whether non compliance with the *Personal Property Securities Act*, S.N.S. 1995-96, c.13 (PPSA) with respect to the directions to pay may be an issue. Also, I noted the well established law that awards to a bankrupt for personal injury are not property belonging to their estates, but may be subject to Section 68 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) where there is a component for loss of income.

[10] Notice of application for November 15th was served on Mr. Kimball. As well I was given assurance by Mr. MacDonald, Mr. Shaw, and Ms. Perry that they had each attempted, but without success, to advise Mr. Brogan of this application.

[11] The claim of Seahold was revised to ask for a declaration that any award, settlement or payment in favour of Ms. Perry in respect to the claim against Mr. Lee is not property of the bankrupt, that is, her estate has no claim to it, except any portion thereof which may arise in respect of loss of income and be subject to Section 68 of the *BIA,* and that the directions to pay are unaffected by her assignment in bankruptcy.

[12] It also asks that any money relating to loss of income not be paid to the bankrupt without further order of the court.

[13] Money recovered for personal injuries is not available to a bankrupt's creditors. As authority for this proposition Mr. MacDonald cites *Hollister, Re*, 7 C.B.R. 629 (Ont, Fisher J.). I quote from paragraph 5:

> It will therefore be seen that the only question for me to determine is, has the trustee Johnston any title or claim to the moneys in question? I am of the opinion that he is not so entitled, as moneys recovered by an undischarged debtor for personal injuries sustained by him is not under *The Bankruptcy Act* "property" divisible amongst the debtor's creditors. The law is well settled that *The Bankruptcy Act* never intended to increase the assets of an insolvent for division amongst his creditors, of moneys recovered in an action for personal injuries, as these moneys are awarded as damages to the debtor for his pain, suffering and loss of comfort of life, to pay his physician, nurses and hospital expenses, and to compensate him whilst he is incapacitated from earning a living for himself and his family (*see Ex parte Vine; In re Wilson* (1878), 8 Ch. D. 364, 47 L.J. Bk. 116, 38 L.T. 730, 26 W.R. 582). It is only actions which relate directly to the bankrupt's property and can be converted into assets for the payment of creditors that pass to the debtor's trustee. Causes of action arising from bodily or mental suffering, such as actions for assault, seduction, criminal conversation, and damages for personal injuries, remain in the bankrupt: (1841), 8 M. & W. 601, 5 Jur. 914.

[14] The 2012 *Annotated Bankruptcy and Insolvency Act* (Houlden, Morawetz and Sarra) at Paragraph F§241 also gives an extensive review of this matter.

[15] The authority therefore clearly confirms that Ms. Perry's estate has no claim against what she may recover in her action against Mr. Lee, except for what may be claimed against any component given in compensation for loss of income.

[16] As to this exception, it is settled law, following *Marzetti* v. *Marzetti* (1994), 26 C.B.R. (3d) (S.C.C.) 161, that compensation for personal injury by way of loss of income may be subject to Section 68 of the *BIA*. It may well result in surplus income. However, this can only be determined once an award or a settlement is made. Accordingly, the order requested will be granted. This is sufficient to dispose of this application.

[17] However, there are a number of background issues which were considered and may be usefully reviewed.

[18] First, for public policy reasons, the assignment of a cause of action is not enforceable. However, an assignment of the proceeds of a cause of action is enforceable. This is clearly stated in Paragraph 16 of *Royal Bank* v. *Woodhouse* (1997), 46 C.B.R. (3d) 29 (Ont., C.A.). This paragraph includes

a quotation from an article entitled *Assignment of Choses in Action in Australia*, by V. G. Starke, Q.C., a distinguished Australian scholar.

This is the quotation:

> *Bare right of litigation not assignable* - - - A bare right of litigation is not assignable, since, on grounds of public policy, related to the doctrine of maintenance, the courts will not countenance the transfer of a bare right to bring a hostile party into Court to recover damages, or the encouragement in this manner of litigation which the assignor himself is not disposed to prosecute. The rule of non-assignability applies . . . to a bare right to sue for damages for breach of contract, or to sue for damages for a personal tort . . .
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> . . . . .
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> *Assignability of certain rights of litigation* - - - The principle that bare rights of litigation are unassignable is not pressed beyond the limits of the public policy doctrines of maintenance and champerty on which it is based . . . In particular, it would seem that there is nothing objectionable in the assignment of the fruits of litigation when recovered, provided that the assignee's purpose is not to engage or participate in the conduct of the proceedings, for the reason that there can be no question of maintenance in respect to such future prop-erty.

[19] It clearly follows that the directions to pay are in effect assignments by way of security to assure payment of the loans made to Ms. Perry. They are bare assignments of the proceeds of a cause of action and not the cause of action itself. They are thus enforceable.

[20] Second, the relevance of the PPSA is I think correctly stated in Mr.

MacDonald's brief as follows:

> To the extent that the assignment of the proceeds of the cause of action is an interest in personal property of the bankrupt, it may be governed by the provisions of the *Personal Property Security Act* (Nova Scotia) ("PPSA"). Seahold did not register a financing statement in respect of the letters of direction executed by Ms. Perry and acknowledged by her solicitor. We submit that, to the extent of the PPSA would apply, Seahold would therefore have an unperfected security interest. Given that the proceeds in issue are not property of the bankrupt, there is no competition between the trustee and Seahold and therefore PPSA section 20 does not apply. We also note that there is no other competing secured creditor with respect to the proceeds of these funds. As a result, the only other possible claimant to the funds would be Ms. Perry and, we submit, that the letters of direction to pay are sufficient to bar any claim by her to the proceeds because she is bound by the terms and a security agreement is effective according to its terms unless the provisions of the PPSA provide otherwise (PPSA s.10).

[21] Parenthetically, as a matter of interest, I note that Section 5 of the PPSA excludes from the application of this act:

> (i) the creation or transfer of a right to damages in tort.

[22] Catherine Walsh in her text: *An Introduction to the New Brunswick Personal Property Security Act* at page 49, says:

> S. 4(i) [the equivalent paragraph in the New Brunswick Act] excludes the creation or transfer of a right to damages in tort from the reach of the *Act* apparently because such claims do not customarily serve as collateral.[46] Rather, an assignment of a tort claim is typically used in the context of the litigation itself as where the victim assigns his or her claim to an insurer for subrogation purposes or to counsel in the context of a contingency

> fee agreement.[47] It is controversial whether the exclusion extends to the assignment of a right to payment that derives from a tort claim such as a right to payment under a settlement agreement. In the United States, the Article 9 Study Committee believes it does not. [48] Several Alberta cases have held that it does.[49] It is better to err on the side of caution and assume that the *Act* applies.

[23] Footnote 47 refers to:

> *Gauthier Estate* v. *Capital City Savings and Credit Union Ltd.* (1992), 3 P.P.S.A.C. 176 (Atla. Q.B.), 1992 Can LII 6121.

[24] This case concerned a bankrupt who had given direction that any cheque covering a settlement of a personal injury claim be made payable to both the creditors and the bankrupt. It was held that this arrangement was covered by the exclusion in the Alberta Act equivalent to Section 5 (i) of the Nova Scotia Act. This was sufficient to exclude the settlement from the application of the Act.

[25] The Court was not concerned with the distinction between an assignment of a cause of action in tort which is clearly what is covered in Section 5(i) and an assignment of the proceeds of the course of action. Prof. Walsh's commentary refines the issue. Section 5 (i) may well not cover an assignment of proceeds as we have here. However, this is all academic as I

accept Mr. MacDonald's analysis in paragraph [20].

[26] Subject to the surplus income matter under Section 68 of the *BIA*, the proceeds will belong to Ms. Perry, subject to the direction to pay. She gave the direction to pay as security for the money Seahold advanced to her. Her situation parallels the usual commercial transaction where a bank loans money to a business on the security of its book debts. If the business becomes bankrupt, the bank will be able to seize its receivables.

[27] I see no reason and no reason has been submitted to me to suggest that Ms. Perry is in any different position regarding this security because of her bankruptcy, than she would be, if she were not in bankruptcy.

[28] The debt may well be discharged as against her by Section 172 of the *BIA*, "but it does not extinguish the underlying legal obligation" (Paragraph 58 of *Buchanan* v. *Superline Fuels Inc.,* 2007 NS CA 68). The right of Seahold under the directions to be paid from any award or settlement remains unaffected.

[29] When the action is concluded, unless there is some issue which is not before me, Seahold will be entitled to be paid from the proceeds in priority to Ms. Perry. The rights of the Trustee under Section 68 of the *BIA* will have to be determined. There may be potential problems which will require further applications to the court.

R.

December 20, 2012
Halifax, Nova Scotia