

SUPREME COURT OF NOVA SCOTIA

Citation: *Levick (Re)*, 2019 NSSC 45

Date: 20190206

Docket: B-16-456148 (Crt No. 40471)

Registry: Halifax

IN THE BANKRUPTCY OF EDWARD MARK LEVICK

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

Applicant

And in the matter of: The Bankruptcy of Edward Mark Levick

Respondent

Judge: The Honourable Justice Ann E. Smith

Heard: October 17, 2018, in Halifax, Nova Scotia

Counsel: Tim Hill, QC, Counsel for Applicant
Deanna M. Frappier, QC, Counsel for Canada Revenue Agency

By the Court:

Introduction

[1] This case involves a claim filed by the Canada Revenue Agency (“CRA”) in the bankruptcy of Edward Mark Levick. Mr. Levick has made an application seeking an order directing the Trustee of his estate not to accept the claim filed by CRA and to proceed with the distribution.

Facts

[2] In January 2016 Mr. Levick was assessed as a third party pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (“*ITA*”). That was in relation to outstanding corporate income tax debt of El-Al Realty Company Limited. On October 31, 2016, Mr. Levick filed a Proposal under *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”).

[3] Mr. Levick was deemed to be bankrupt. CRA did not file a proof of claim in the bankruptcy.

[4] On November 24, 2016, the Trustee sent a Notice of Bankruptcy and Impending Automatic Discharge of Bankrupt to CRA. CRA filed a proof of unsecured claim for \$161,477.56 and voted against the proposal.

[5] On August 22, 2017, Mr. Levick was discharged from bankruptcy. CRA did not file a proof of claim. It had been contacted by the trustee and invited to file a claim. CRA advised the trustee that no claim would be filed. The trustee sent CRA a Notice Requiring Person to Prove Claim, under s. 149 of the *BIA*. CRA did not respond to that notice. After the expiry of the 30-day notice period the trustee declared a final dividend in the estate. That happened on December 19, 2017.

[6] After an inquiry from the Superintendent of Bankruptcy, CRA filed a proof of claim on January 9, 2018. Why it took that long to get CRA to respond is not clear. The trustee filed an amended Statement of Receipts and Disbursements providing for the payment of a dividend to CRA.

[7] The filing of the proof of claim by CRA was outside the 30-day period set out in the *BIA*. Mr. Levick seeks to have the claim by CRA disallowed.

Issue

[8] Can CRA file a claim after a dividend has been declared when it did not file the proof of claim within the time limited by the *BIA*?

Time Limits

[9] Section 149 of the *BIA* says that when a trustee has notice that a creditor appears to have a claim against a bankrupt estate, the trustee should send a notice to the creditor to prove the claim. If a creditor who has received a notice does not prove a claim within 30 days, that creditor's claim is excluded from "all share in any dividend." Here, CRA did not file a proof of claim within 30 days.

[10] CRA could have applied to the Court for an extension of that time and did not.

[11] CRA was outside the time limits set out in the *BIA*.

[12] Section 150 of the *BIA* provides that a creditor who has not proved his claim before the declaration of any dividend is entitled on proof of the claim to be paid out of money that is still in the hands of the trustee. The creditor is not entitled to disturb the distribution of a dividend declared before his claim was proven, except on terms as may be ordered by the Court.

[13] Counsel for Mr. Levick has argued that s. 150 does not apply to creditors who have received a notice to file a proof of claim. He says that the reason for that is obvious. If s. 150 could be used where notice had been given under s. 149(1), then s. 149(2) which excludes a person who has not proven a claim within the time limit from a share in any dividend, would be meaningless.

Just Distribution

[14] If CRA is prevented from sharing in any distribution, Mr. Levick will have received a windfall as a result of CRA's failure to file in a timely way.

[15] The interpretation to be given to s. 150 is significant. That section suggests that the proof of claim and the timing of the distribution of the dividend are related. If the claim is not proven before the distribution has been made, the creditor is not entitled to disturb that dividend. If the money is still in the hands of the trustee, the creditor may still prove his claim even if out of time.

[16] In *Bank of Nova Scotia v. Janzen (Trustee of)* (1989), 71 C.B.R. (N.S.) 277, 90 N.S.R. (2d) 67, 230 A.P.R. 67 (T.D.) the Bank of Nova Scotia was the creditor.

The bank filed a proof of claim although it was not in proper form. It was returned by the trustee. Due to negligence, the bank failed to return a properly completed proof of claim. The trustee prepared a dividend sheet and the bank became aware that its claim had been excluded. The bank then filed a properly completed proof of claim prior to the actual distribution of the dividend.

[17] Justice Hallett wrote the following at para. 6.

To disallow a creditor's proof of claim filed before the distribution of a dividend is too harsh a penalty, even if the creditor was negligent in filing its proof in the first instance. The objective of bankruptcy legislation to give all creditors and opportunity to share in the assets can be achieved by penalizing the late filing creditor by charging against the creditor's share of the estate the cost of additional work required by the trustee to alter the dividend sheet, etc.... In my opinion the learned registrar erred in failing to consider the basic principle that allows creditors with proven claims to share in the estate if the distribution has not been made before the claim is filed. In this case, there was not going to be any further distribution and, considering all the circumstances, to disallow the bank to participate in a share of the amounts available for distribution is an improper exercise of discretion.

[18] Justice Hallett's reasoning was based on an older expression of the general rule that "so long as there remain undistributed assets in bankruptcy a creditor is entitled to come in and prove, as is the case in an administration suit so long as there are assets unadministered." *Ex parte Boddam, Re Taylor* (1860), 2 DeG. F. & J. 625, 45 E.R. 763 (L.J.J.) at p. 765. Justice Hallett cited another English case from 1902, *Re McMurdo; Penfield v. McMurdo*, [1902] 2 Ch. 684 (C.A.), also for the proposition that a creditor may at any time come in and prove a claim, provided that the proof does not interfere with the prior distribution of the estate and subject to terms that the Court may think just to impose.

[19] A just distribution, when the funds are still in the hands of the trustee, is to allow the creditor to prove its claim. The debtor should not reap a windfall from a just but delinquent creditor. Other creditors are not prejudiced because they are protected for any money that has been dispersed. Their interest is diluted only with respect to money remaining in the hands of the trustee.

[20] The reasoning in *Janzen* would allow for the filing of the proof of claim by CRA and the distribution of money that has not already been distributed. Section 150 does not allow for the filing of proof of claim out of time to affect a distribution that has already been made. If the money remains in the hands of the

trustee, the claim may be made, and the Court may impose other terms to address the lateness of the filing.

[21] *Janzen* is not consistent with the ruling in *125258 Canada Inc. (Trustee of) v. Walker*, 1986 CarswellQue 39, 64 C.B.R. (N.S.) 183 (Registrar Pellerin). In *Walker* the creditors had received two notices to prove their claims and had failed to do that. After the time had expired to prove their claims, they filed claims. The trustee disallowed them, and the creditors appealed to the registrar.

[22] The registrar concluded that the remedial provisions that allowed a creditor to file a proof of claim and participate in any dividends to be paid by the trustee, without upsetting the previous distribution, did not apply where the creditor had received notice to prove a claim. The time limits are meaningless if a creditor can simply rely on the remedial provision to file the proof of claim out of time.

[23] With respect, the reasoning in *Janzen* is more persuasive. A just distribution requires that some consideration be given to the rights of a just claim made by a negligent claimant. The use of s. 150 to allow for late filing does not mean that the filing limits have no meaning. The creditor who files late has lost the benefit of participating in any distribution that has already been made. The claim may be subject to other conditions to reflect the lack of diligence on the part of the creditor.

Conclusion

[24] The motion made by Mr. Levick is denied.

[25] This matter was heard as a half-day chambers motion. Tariff C costs are awarded to the respondent in the amount of \$1,000.

Smith, J.