Court of King's Bench of Alberta

Citation: 1393392 Alberta Ltd. v 2128348 Alberta Ltd., 2024 ABKB 554

Date: 20240919
Docket: 2201 13575; 24-3008902; 24-3008950
Registry: Calgary

2024 ABKB 554 (CanLII)

Between:

1393392 Alberta Ltd.

Plaintiff

- and -

2128348 Alberta Ltd., 2128348 Alberta Ltd. Carrying on Business as Just Bite Me Meals, Daniel Koren-Clark, Stacey Clough, John Doe, and XYZ Corp.

Defendants

And:

In the Matter of the Bankruptcy of 2128348 Alberta Ltd.

And:

In the Matter of the Bankruptcy of Daniel Christopher Koren Clark

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Reasons for Judgment
of the
Honourable Justice B.E. Romaine

I. Introduction

[1] In these applications, the applicant creditor seeks orders lifting certain stays and allowing it to bring proceedings against a company in bankruptcy and two of its directors, one of whom is also in bankruptcy proceedings. The Trustee in bankruptcy for the corporation and the director opposes the application, as do the two directors, primarily on the basis that the applicant does not meet the threshold merit requirement of section 38.

II. Facts

[2] The applicant 1393392 Alberta Ltd. (**139**) loaned funds to 2128348 Alberta Ltd. (**212**) and its directors Daniel Koren-Clark and Stacey Clough for the purpose of expanding their business. The operating name of 212, which was incorporated on June 28, 2018, was "Just Bite Me Meals", and Mr. Koren-Clark and Ms. Clough were directors of 212 at the relevant times. No formal documentation exists with respect to the loan.

[3] In addition, 139 rented space to 212 for Just Bite Me Meals. A lease dated January 1, 2020 between 139 as lessor and Just Bite Me Meals as tenant was signed by Mr. Koren-Clark as "Owner" of Just Bite Me Meals.

[4] The loan and lease defaulted and on or about May 19, 2022, 212 effected a "midnight move", breaking the lease and, 139 submits, taking much of the kitchen equipment with it.

[5] 139 filed a statement of claim on November 22, 2022, pleading that there had been an improper transfer of business opportunities to a new company (later discovered to be 2472785 Alberta Ltd. (**247**)), the reviewable transaction sections of the ***Bankruptcy and Insolvency Act,*** RSC 1985, c B-3, the oppression remedy under s.242 of the *Business Corporations Act* and various statutory and common law preference allegations, including the intentional obfuscation of the claim.

[6] The loan balance at the time of filing the statement of claim was:

a) $605,000 cash, (the primary loan);

b) $16,887.93 in cash from Darren Weeks, which was assigned to 139; and

c) utilities, which were paid on behalf of 212 and its principal, in the amount of $52,891.35.

[7] $61,500 was repaid.

[8] Excluding interest, the resulting principal balance claimed by 139 as at the filing date of the claim was $577,072.62.

[9] 212 was dissolved on December 2, 2022, immediately after the filing of the statement of claim, and ceased operations. The business was operated at another location owned by Wesley Wall and Adam Wall.

[10] Before and/or during litigation relating to the loan and lease, it appears that the kitchen equipment that 212 removed from 139's premises was transferred to 247 by Mr. Koren-Clark as a director of 212. It is unclear whether any other part of 212's business, whether it be good will, business opportunities or intellectual property, was transferred. 247 was incorporated by Mr. Koren-Clark as original director and shareholder on November 11, 2022. 247 carries on business with the same name, logo, brand, business model, physical address, kitchen equipment, social

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media accounts as 212, and uses the same phone number. Mr. Koren-Clark stated on his own Instagram account (which was regularly updated) that he was the "owner" of Just Bite Me Meals, up until these applications, when he closed his Instagram account.

[11] The current director of 247 is Wesley Wall, and the shareholders are:

a) 1498254 Alberta Ltd. – 51%

b) 2098032 Alberta Ltd. – 25%

c) Jares Inc. – 6%

d) Genics Inc. – 18%

[12] Prolonged litigation ensued.

[13] Summary judgment was obtained against 212 in the approximate amount of $1,249,000 on August 3, 2023 by Justice Farrington, broken down to $1,020,000 for the loan, and $228,000 for the lease.

[14] In September, 2023, Mr. Koren-Clark swore a Statutory Declaration of Corporate Director arising from the 212 judgment that 139 submits is objectively inaccurate, as shown by subsequent disclosure. This declaration merely states "N/A" in all of its responses. Affidavits of Record (AoRs) were delivered by Mr. Koren-Clark and Ms. Clough that 139 submits were transparently deficient. When better AoRs were sought, 139 learned for the first time that on November 10, 2023, Mr. Koren-Clark had filed for bankruptcy protection and had assigned 212 into bankruptcy.

[15] Ms. Clough was ordered to produce a better AoR, with a specific requirement that she produce all bank records and other financial information. Ms. Clough has been cross-examined on her AoRs. It is clear that Ms. Clough has failed to produce many records, and that she had purged her emails. She says that Mr. Koren-Clark handled the financial aspects of the business.

[16] 139 was appointed inspector of 212 in bankruptcy. In November, 2023, at the first meeting of creditors, 139 raised concerns about the transfer of all of 212's business to 247. 139 requested information from the Trustee.

[17] In March, 2024 the Trustee in bankruptcy of Mr. Koren-Clark (the same Trustee) issued a disallowance of 139's proof of claim against Mr. Koren-Clark.

[18] On June 18, 2024, shortly before these applications were heard, the Trustee of 212 and Mr. Koren-Clark provided a First Report.

[19] The First Report confirms that:

a) various kitchen equipment, valued by the Trustee at approximately $114,695, was transferred from 212 to 2136743 Alberta Ltd. and then to 247;

b) 247 is heavily indebted to the CRA for outstanding source deductions and GST, including a deemed trust claim of $283,714.47;

c) the Trustee is awaiting the results of an appraisal of the assets of 212, and upon receipt, intends to apply for an order to sell the assets of 212 to 247 at the appraised value. The Trustee intends to remit the proceeds to the CRA and does not anticipate any dividends to the secured creditors;

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d) the Trustee's review of 212 bank statements did not disclose what the Trustee would consider to be any preferences or fraudulent conveyances;

e) an initial review of 212's shareholder loan ledger for the period from July 1, 2024 to June 30, 2022 revealed that Mr. Koren-Clark and Ms. Clough withdrew $245,149.64. The Trustee notes that, at most, $173,168.24 was for personal use. The Trustee notes that the accounts are poorly recorded; and

f) although the CRA has not conducted a trust examination of 212 at this time, there is still time for director's liability to be raised against Mr. Koren-Clark and an unsecured claim filed in his estate.

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[20] The Trustee is only in possession of 212's bank statements for the period of April 2021 to February 2023, inclusive.

[21] Specifically with respect to 139's claim against Mr. Koren-Clark, the First Report states that an amended claim from 139 would not provide a different result as no information or evidence has been provided to the Trustee that Mr. Koren-Clark is personally liable for any debts owed to 139. The Trustee points out that a statement of claim is not sufficient evidence of a valid claim, and that 139 has not provided anything else that would lead it to be of a different opinion. 139's position is that certain emails between Mr. Weeks in his personal capacity and his controller with respect to issuing cheques to Mr. Koren-Clark, and at least one email between Mr. Weeks and Mr. Koren-Clark directly establish a *prima facie* case of personal liability.

[22] 139 seeks the assignment of claims that it alleges 212 has against its former directors (Mr. Koren-Clark, Ms. Clough and others) arising from alleged dividends and the transfer of 212's assets. 139 submits that 212 was a thriving business and shortly after demands for repayment were being made by 139, 247 was incorporated by Mr. Koren-Clark, and the entirety of 212's business, business opportunities, goodwill and assets were just transferred to an admitted alter-ego.

[23] 139 seeks the following relief:

(i) an order to lift the bankruptcy stay against 212 for enforcement of the 212 judgment;

(ii) an order to lift the bankruptcy stay against Mr. Koren-Clark for prosecution of the action;

(iii) a Section 38 order under the ***BIA*** as the Trustee of 212 has confirmed it will not take steps against Mr. Koren-Clark; and

(iv) certain amendments to the Statement of Claim that cannot occur while the stay is in place. 139 submits that this it is the most efficient process, rather than starting a new claim against 247.

III. Analysis

A. Section 38 Application

[24] If a trustee in bankruptcy refuses to take a proceeding that a creditor is of the opinion would be for the benefit of the estate of the bankrupt, section 38 of the *BIA* allows the creditor to

apply for an order authorizing it to take the proceeding in its own name and at its own expense and risk.

[25] To obtain a section 38 order, the applicant must meet four criteria:

1) it must be a creditor of the bankrupt estate;
2) it must have requested that the trustee undertake the proceeding which the applicant now seeks permission to undertake itself;
3) the trustee must have refused or neglected to undertake the requested proceeding; and
4) there is threshold merit to the proposed proceedings: ***Smith v Pricewaterhousecoopers Inc.,*** 2013 ABCA 288 at para. 16.

[26] Although the threshold merit requirement is not particularly high, an applicant seeking leave under Section 38 must demonstrate a *prima facie* case, which must be supported by evidence, and not mere allegations, sufficient to persuade the Court that the claim is not obviously spurious: ***Smith*** at para 19, 22.

[27] The Trustee notes that 139 has not asked whether the Trustee would commence proceedings against the named "others", including 247, but only whether it would commence proceedings against 212's former directors. While this is a procedural issue with respect to the third requirement of the test, it does not preclude 139 from proceeding with its application with respect to the named directors.

[28] The main issue is whether 139 has established the threshold merit required to be granted a section 38 order.

[29] The action that 139 proposes to take in the name of 212 against Mr. Koren-Clark, Ms. Clough "and others" makes the following allegations:

a) that Mr. Koren-Clark is personally liable on the lease, in addition to 212's liability;
b) that Mr. Koren-Clark and Ms. Clough, as directors of 212, induced 212's breach of contract, and therefore breached their fiduciary duties to 212 and are liable for oppressive conduct as against 139;
c) that Mr. Koren-Clark and Mr. Clough caused the transfer of the loan, or parts of it, and "retained earnings" of 212 to be transferred to themselves or third parties with a view to hindering collection by 139 at a time when 212 was otherwise insolvent;
d) that Mr. Koren-Clark and Ms. Clough incorporated 247 to receive the property of 212 for no consideration, and carry on its business as a sham;
e) alternatively, that Mr. Koren-Clark and Ms. Clough permitted transfers from 212 by way of dividends when 212 was insolvent or in a manner that preferred their own interests over 139.

[30] 139 seeks damages, certain declarations, an oppression remedy, tracing, disgorgement, and a declaration of unjust enrichment and a constructive trust, among other relief.

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[31] With respect to the allegation that Mr. Koren-Clark is personally liable on the lease, the evidence indicates that he signed it as owner of "Just Bite Me Meals", the operating name of 212. Given the context of the relationship, it appears unlikely that the intention of the parties was that Mr. Koren-Clark would be personally liable, but that would depend on the credibility of the parties, which cannot be determined in these applications. However, 139 has already received judgment against 212 with respect to the lease, which implies that 139 accepts that 212 was the tenant, and 139 cannot now pursue an alternate theory of personal liability against Mr. Koren-Clark. Therefore, this claim does not meet the requirements of section 38.

[32] In addition, while a number of emails were exchanged between Mr. Weeks and his controller, and sometimes directly with Mr. Koren-Clark, referring to money to be paid to Mr. Koren-Clark, the emails and resulting cheques do not support the proposition that Mr. Koren-Clark is personally liable on the primary loan. For the most part, the emails refer to the acquisition of kitchen equipment and the construction of improvements to the premises, which relate to the lease. It is noteworthy that the emails from Mr. Weeks were sent from email addresses other that that of 139, although he now purports to sue Mr. Koren-Clark and Ms. Clough through his corporation, 139. These allegations do not satisfy the requirement of a *prima facie* case for the purpose of a section 38 application.

[33] With respect to the allegations of oppression (breaching fiduciary duties to 212, oppression against 139, and paying themselves dividends in a manner that preferred their own interest over that of 139 as a creditor), there is little evidence of the details of the transfer of the business of 212, other than the transfer of kitchen equipment to 247.

[34] As was the case in ***Henderson v Peerani***, 2023 ABKB 321, the applicant's real complaint is that the directors of 212 moved its assets to its prejudice as a creditor. Lema, J. noted in ***Henderson*** that this is the "game of fraudulent preferences or under-value transfers – moving assets away from creditors entirely", and that the ***BIA*** provides remedies that would result in the return of such assets to the bankrupt estate. While the facts of ***Henderson*** are distinguishable, the foregoing analysis is equally relevant in this case, particularly as it appears from the Trustee's Trust Report that the Trustee intends to seek an order that would return the value of the hard assets to 212's estate in bankruptcy. This appears to be the Trustee's short-hand method of addressing what would be a *prima facie* case of a fraudulent transfer that arises from the presumed "fraudulent intent" underlying this transfer of assets, given the presence of certain "badges of fraud" are apparent in this case: ***Krumm v McKay***, 2003 ABQB 437 at paras 18-21, 25.

[35] The Trustee notes that the funds will then be remitted directly to the CRA with respect to its deemed trust claim against 212.

[36] With respect to any value to 212 above the value of its hard assets, counsel for the Trustee submits that any value would not be sufficient in any event to satisfy the entirety of the deemed trust claim. There is no evidence to the contrary from 139 about the value of intangible assets, other than mere speculation. The fact that 247 may be using any good will that belonged to 212 does not give it any substantial value. Therefore, a claim of this nature would result in no value to the creditors of 212 other than to the CRA; thus, it does not satisfy the requirement of a *prima facie* case with respect to a section 38 application brought by 139.

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[37] The last basis for a claim that might meet the section 38 test is the allegation that Mr. Koren-Clark and Ms. Clough caused funds to be transferred from 212 to themselves, either from loan funds directly or through dividends when 212 was insolvent.

[38] There is evidence from the examination on affidavit of Ms. Clough that her tax return notices of assessment showed dividends paid to her as follows:

a) 2018: $81,200;

b) 2019: $103,500;

c) 2020: $97,750; and

d) 2021: $63,997.

[39] 319 submits that it should be inferred that Mr. Koren-Clark was paid at least an equal amount of dividends. Ms. Clough says that she and Mr. Koren-Clark were paid dividends instead of salary, and that, in any event, these amounts were inflated in order to make them eligible for a mortgage. She testified that she did not actually receive the money. Again, credibility is not an issue that can be determined in these applications.

[40] In addition, the Trustee reports that:

> A review of the 212's Shareholder Loan Ledger for the period of July 1, 2021 to June 30, 2022 reveals a total debit balance of $245,149.64 in the Shareholder Loan account. At an initial look, this would mean that Clark and Ms. Clough withdrew a net amount of $245,149.64 in the one (1) year period of July 1, 2021 to June 30, 2022. Of the amounts included in the Shareholder Loan account, there are two (2) payments to the Canada Revenue Agency which occurred April 25, 2022 in the amount of $30,279.40 and May 2, 2022 in the amount of $41,702.00, for a total of $71,981.40. After deducting the amounts paid to the CRA for corporate taxes owing, other accounts are poorly recorded and may or may not justly be shown as a debit in the Shareholder Loan account. At most, Clark and Ms. Clough withdrew $173,168.24 for personal use during the one (1) year period of July 1, 2021 to June 30, 2022.

[41] This analysis forms one of the reasons why the Trustee declined to proceed against Mr. Koren-Clark and Ms. Clough. However, notwithstanding what the Trustee may think is practical and prudent, there is evidence of Mr. Koren-Clark and Ms. Clough receiving dividends and using 212 for personal use sufficient in itself to satisfy the section 38 threshold merit requirement. It is also apparent that, while admitting that the accounts are poorly recorded, and that the approximately $173,000 the Trustee suggests is attributable to personal use arises from unreconcilable transactions and not bank statements, it appears that the Trustee has not taken the additional step of seeking banking documentation from all of the years during which 212 was indebted to 139 and carried on business.

[42] It is clear that both Mr. Koren-Clark and Ms. Clough through their previous counsel and advisors have engaged in litigation conduct that has unduly delayed and frustrated the discovery of facts that would allow a full assessment of whether they are personally liable to 139 on either the loan or the lease.

[43] However, given the analysis that the Trustee has performed at this stage, and the relatively low amount of money for which Mr. Koren-Clark and Ms. Clough may be liable on

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known facts and investigation, I agree that an alternative and less intrusive remedy to a section 38 order would be to grant an order pursuant to section 163(1) of the ***BIA*** and section 29(5) of the ***Canada Evidence Act,*** R.S.C. 1985, c. C-5, to enable the Trustee to obtain the bank records of both 212 and Mr. Koren-Clark during the relevant periods, and to examine Mr. Koren-Clark on them with respect to this issue.

[44] While the discord between 139 and the Trustee and the delay in the flow of information may make 139 wary of whether the Trustee is in a better position to determine the issues of personal liability and benefit to the estate raised in these applications, this approach should provide sufficient evidence to determine the viability of these issues without the need for complex and time-consuming litigation.

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B. Lifting the Stay

[45] Given the decision I have made with respect to the section 38 application, it is not necessary that I decide whether to lift the stays with respect to Mr. Koren-Clark and 212. If, however, I am incorrect with respect to the section 38 application, I would decline to lift the stay against either 212 or Mr. Koren-Clark for the following reasons.

[46] In order to obtain an order lifting a stay, the applicant must satisfy the court that:

a) the creditor or person is likely to be materially prejudiced by the continued operation of the stay; or

b) it is equitable on other grounds that the stay be lifted: section 69.4 of the ***BIA***;

[47] The test for lifting a stay focuses on the totality of circumstances and the relative prejudice to the parties involved in the receivership. The burden on the application is on the applicant: ***Ma, Re***, [2001] O.J. No. 1189 (Ont. C.A.).

[48] Lifting a stay is not routine: there must be sound reason to lift the stay: ***Ma, Re*** at para 3.

[49] With respect to prejudice, it is not sufficient for 139 to allege that it would be deprived of its rights either under the lease or the loan. As was the case in ***Alignvest Private Debt Ltd. v Surefire Industries Ltd.***, 2015 ABQB 148, the prejudice to 139 of being deprived of its rights under the lease is no different from that suffered by other creditors: para 44. The lack of formal documentation with respect to the loan makes the loss of any alleged rights even less likely to support a finding that 139 should be treated differently from other creditors, or that it would be unfair not to lift the stay. There are no persuasive equitable reasons to lift the stays in this case.

[50] While there is no requirement for the applicant to establish a *prima facie* case, it is clear from the Trustee's First Report that there is little or nothing to be gained by lifting the stays and permitting the proposed action to be taken.

C. Standing

[51] While it is correct that, as a general rule, prospective defendants do not by virtue of that status alone, have standing to oppose a section 38 application, there are exceptions to the rule. In this case, while I permitted submissions to be made by counsel for the proposed personal defendants, those submissions were largely adopted and repeated by the Trustee, and therefore, it was not necessary that I rely on the submissions of the proposed defendants in making these decisions.

IV. Conclusion

[52] 139's application for a section 38 order with respect to 212 is dismissed. However, I grant an order pursuant to section 163(1) of the ***BIA*** and section 29(5) of the ***Canada Evidence Act*** directing the Trustee to obtain the bank records of both 212 and Mr. Koren-Clark during the time that 212 was indebted to 139 under the lease and the loan, and to examine Mr. Koren-Clark on the issue of whether he and/or Ms. Clough caused funds to be transferred from 212 to themselves and for what purpose.

[53] Given this direction, it was not necessary to decide whether to lift the stays with respect to 212 and Mr. Koren-Clark.

[54] If the parties are unable to agree on the issue of costs, they may make written submissions to this Court.

Heard on the 25th day of June, 2024.
Dated at the City of Calgary, Alberta this 19th day of September, 2024.

B.E. Romaine
J.C.K.B.A.

Appearances:

Patrick Robinson
for the Applicant 1393392 Alberta Ltd.

Locklyn E. Price and Brody Sikstrom
for the Respondents Daniel Koren-Clark and Stacey Clough

David Archibold
For the Trustee

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