

N2UR

LOW
PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

16/2

B. NO. 104/95
IN BANKRUPTCY

IN THE MATTER of the Insolvency Act 1967

A N D

1949

IN THE MATTER of PAUL JOHN JENKINS a.k.a.
PAUL GILL and PAUL McGILL

Debtor

EX PARTE

MIDWEST DISTRIBUTORS
LIMITED

Creditor

Hearing: December 14, 1995

Counsel: D.W.R. Bell for Petitioning Creditor
F.P. Divich for Debtor

Judgment: December 14, 1995

(ORAL) JUDGMENT OF MASTER ANNE GAMBRILL

Solicitors for Petitioning Creditor

Martelli McKegg Wells & Cormack
DX CP24036, Auckland

Solicitors for Debtor

Connell Rishworth Gerard
DX AP24503, Whangarei

I have before me an application for adjudication. The facts set forth in the chronology as filed by the petitioning creditor (and annexed hereto) refer to in full the bulk of the affidavit evidence in support of the application. The names which are relevant are also set forth therein

The debtor opposes on the ground that the judgment is a judgment against Paul Jenkins and not against Paul Gill who is the person now presently before this Court. He says that "Paul Jenkins is a separate and entirely unique human being from myself". There was no appearance when a Summary Judgment was entered, the judgment was based on a credit contract entered into by Kathryn Alice Jenkins and the creditor; it was not signed by Paul Jenkins or Paul Gill. He also filed an affidavit with his driving licence in the name of Paul Brian Gill annexed. His solicitors had sought information particularly as to the evidence to be put before the Court and that information, his Counsel says, has only been forthcoming in the affidavit filed on 1 December 1995 and referred to in the chronology.

Miss Divich in opposing has asked me to note the difficulties her client has encountered in respect of this matter because of his present situation as a prisoner. She has indicated to me that he has asked her to inform the Court that he would have preferred to have been present in Court today. She has also outlined the difficulties she had in obtaining instructions and also referred to the comments made by Mrs Jenkins who has filed her own petition and who was the party who signed the contract under which the petitioning creditor sought Summary Judgment. Miss Divich makes it clear that Mr Gill has not felt it was incumbent to take any steps in respect of the District Court judgment as he is not Mr Jenkins and he is not the party affected thereby.

I turn to the submissions of the judgment creditor who outlined the three issues (on page 1 of the submissions). Counsel also outlined the relevant facts referring them to the chronology:

1. It is submitted by the creditor that there are three issues in these proceedings. The first is whether the person against whom judgment was obtained is the same person against whom the bankruptcy petition was brought and whether the proceedings have been properly brought to that person's attention.
2. The second issue (if the answer to the first issue is yes) is whether judgment was properly obtained. No steps have been taken to overturn the judgment obtained against Kathryn Jenkins and Paul John Jenkins to date.
3. The third issue is whether a judgment and subsequent bankruptcy proceedings based on that judgment in the name falsely used by a debtor is a procedural defect able to render the documents a nullity.

After service of the bankruptcy notice no steps were taken until the time had expired when this issue of the identity of Mr Gill and Mrs Jenkins was raised. The petition was served on the debtor and he acknowledged with the answer 'Yes', I am told from the Bar, to the question did he answer to the names of Paul Jenkins, Paul Gill and Paul McGill.

The creditor's submissions were (a) judgment was obtained against the same person against whom the bankruptcy petition was brought; and (b) have those proceedings been property brought to that person's attention. Counsel traversed the historical records of the business and the subsequent entry of the Summary Judgment. Counsel also identified Rule 569 of the District Court Rules. Miss

Divich argues that it should have been necessary and the steps should have been taken to amend the judgment to include the name Paul Gill. Counsel for the creditor, however, relied on Rules 3, 4 and 5 of the Insolvency Rules, particularly 5(3), Rule 4 of the High Court Rules and Rule 37(2) in respect of the correct form for originating documents. I am satisfied that Mr Gill is adequately identified in terms of the affidavit evidence and in terms of the necessary documents.

I turn to the judgment. Was it properly obtained? The Court is entitled to inquire into the nature of a judgment on which a bankruptcy petition is founded. This judgment is on the face of the record a valid judgment of the Court, no application has been made to set it aside and I am satisfied that in answer to Mr Gill's contention there is sufficient evidence on the balance of probabilities to satisfy me that the judgment was properly obtained.

I turn to the issue of the judgment and the bankruptcy proceeds, if issued in a false name. Does the use of the name 'Jenkins' by the debtor constitute such a procedural defect that the documents become a nullity? The petitioning creditor's solicitors had prepared submissions carefully on this point which raised an interesting issue. Counsel analysed the affidavit evidence and circumstances in which Paul Gill used the name Paul Jenkins. The evidence relating to the contacts made with Paul Jenkins and the fact the addresses used by Paul Jenkins and Paul Gill in three instances are the same. She compared the affidavit evidence before the Court and submitted, and I accept, that Paul Gill was properly served with a bankruptcy notice at Awaroa Station, Kaitaia on 31 July, 1995 answering to all three names, Paul John Jenkins, Paul Gill and Paul McGill when the bankruptcy petition was served. I am satisfied therefore that the proceedings have been properly brought to Paul Gill's attention. He is the person against whom judgment was obtained using the name Paul Jenkins. The

debtor has submitted that as the judgment was in the name of Paul Jenkins, it could not be a judgment against Paul Gill and the judgment creditor had taken no steps to alter the name on the judgment obtained in the Kaikohe District Court as prescribed in Rule 569 of the District Court Rules 1992. The petitioning creditor's submission was that it was not necessary to make an application under Rule 569 nor was it an appropriate Rule to use on an ex parte application for a change of name or address after judgment. I accept that Paul Gill and Jenkins are two names used by the same person. Sections 3, 4 and 5 of the Insolvency Rules set out the forms and procedures to be followed with regard to the issue of bankruptcy proceedings. Rule 5(3) provides that

".....where any form in the First Schedule is prescribed, such variations may be made therein as the circumstances of the particular case require."

I accept Rule 4 of the High Court Rules applies to the proceeding and Rule 37(2) of the High Court Rules applies in regard to the correct form of originating documents. It says:

".....notwithstanding subclause (1), a fuller title may be used upon change of parties or if any party considers that a person has in their previous document been wrongly named or for other sufficient reasons."

It is clear that Paul Jenkins' aliases came to light and his other names of Paul Gill and Paul McGill were used in order to describe the debtor more particularly in accordance with the Insolvency Rules. Counsel submitted that he had been properly identified by address and job description and therefore the Rules had been complied with. I am satisfied that the Rules have in fact been complied with. If, however, it could be argued that they have not, I am satisfied that s.11 of the Insolvency Act 1967 would be sufficient to cure the defect.

Counsel drew the attention of the Court to MOT. v. Cash Oat Company of Christchurch Limited CA.81/83 20/2/84. The facts of this case are clearly distinguishable from that decision; that criminal information had been directed at the wrong target in the sense the wrong Defendant or no real Defendant had been named in the information. Clearly a debtor has been named in this information and the necessary evidence to identify the debtor has been put before the Court.

Counsel also addressed the matter whether the petition could be regarded as a nullity but I am satisfied in respect of the decision put before the Court, it was not and could not be regarded as a nullity. There was no defect of substance. At worst, the use of names could be regarded as an irregularity. There was no real defect in the description of the debtor by the three different names which the creditor had ascertained, after the act of bankruptcy occurred and after judgment was entered, that the debtor was using no doubt to avoid the situation which is presently before the Court today.

In Police v. Curran S.35/90, High Court, Hamilton, 31/10/90, the Defendant falsely gave his brother's name and address to a Constable and was convicted and sentenced to a charge of driving with excess blood alcohol under the false name. Fisher, J. observed:

"I do not think using a false name automatically invalidates a conviction or sentence passed.....names are after all no more than labels for identifying individuals. If the individual has been correctly identified by other means for example the physical presence in court of the individual referred to in the summary of facts, the use of a different label or alias seems immaterial.....".

Accordingly, at the end of the day, I am satisfied that the petitioning creditor has, in terms of the Insolvency Act 1967, made out a case for an order of

adjudication. There will be an order of adjudication against Paul John Jenkins, also known as Paul Gill and Paul McGill and for the purposes of the adjudication as it is the name under which he is presently serving a sentence, the order will be formally made against Paul Brian Gill.

Costs. A grant of legal aid was obtained on Tuesday last and I do appreciate the difficulties Miss Divich has had in respect of this particular issue. Nevertheless I do not feel her client has been disadvantaged in any way by the delay in the grant and the relevant facts that are necessary have been fully before the Court or obtainable from the files that are here. Mr Bell seeks substantial costs. There have been difficulties in respect of this file and as he points out the order will be against the bankrupt's estate and not against the debtor personally. In my view it is a case where an order should be made. There will be an order for costs of \$1,000 together with all disbursements incurred including the service fees as per the accounts rendered by the process servers.



MASTER ANNE GAMBRILL

CHRONOLOGY

- August 1994 J K Knight, owner of house at Kerikeri Road, RD 3, Kerikeri puts house on market for sale (Knight affidavit)
- 29 August 1994 Kathryn Jenkins and Paul Gill enter into agreement to lease retail premises at 63 Kerikeri Road for gas appliance retail business (Webb affidavit)
- 6 September 1994 Knights enter into written agreement for sale of Kerikeri Road house to Paul Gill and Kathryn Jenkins (Knight affidavit)
- 13 September 1994 Kathryn Jenkins signs application for charge account with creditor, names proprietors as KAM Jenkins and P Jenkins and trade name "Northgas". Business described as "gas retail appliances" and address as 63 Kerikeri Road, Kerikeri and personal address as 6 Causeway Road, Haruru Falls, Paihia (Clarry affidavit)
- 15 September 1994 Creditor accepts application for charge account (Clarry affidavit).
- 30 September 1994 Creditor makes first supply of goods to "Northgas" at 63 Kerikeri Road, Kerikeri (Clarry affidavit). K Jenkins and Paul Gill move into Knights' Kerikeri Road house. (Knight affidavit)
- 3 October 1994 Paul Gill and Kathryn Jenkins move into shop at 63 Kerikeri Road (Webb affidavit).
- 6 & 13 October 94 Creditor supplies further gas appliances to Northgas at 63 Kerikeri Road (Clarry affidavit).
- 7 October 1994 Paul Jenkins requests Hodgson to remove furniture from 6 Causeway Road, Haruru Falls to his new address at Kerikeri Road, R D 3, Kerikeri giving his work telephone number and contact address as those used by Kathryn Jenkins and Paul Gill. (Hodgson affidavit).
- 8 October 1994 Hodgson moves furniture for Paul Jenkins, who gives his contact number at Northgas.
- October 1994 - 25 February 1995 Kathryn Jenkins and Paul Gill trade under name Northgas at 63 Kerikeri Road, (shop). Paul Gill was seen there almost every day. (Webb affidavit).

November 1994 Hodgson presses Paul Jenkins for payment for removals.

21 November 1994 Fax from "Paul" on Northgas letterhead accepting liability for payment. (Clarry affidavit).

30 November 1994 Creditor issues summary judgment proceedings in District Court, Kaikohe.

December 1994 Hodgson presses for payment, rings Northgas and asks for Paul. Identifies Paul Gill as person known to him as Paul Jenkins (Hodgson affidavit).

December 1994 -
January 1995 Creditor's process server attempts service of District Court proceedings. Paul Jenkins agrees to meet process server at 63 Kerikeri Road, but fails to keep appointments. Paul Jenkins evades service. (Hemming affidavit).

25 February 1995 Paul Gill and Kathryn Jenkins vacate shop premises taking all stock leaving rent owing (Webb affidavit).

28 February 1994 Paul Gill and Kathryn Jenkins fail to complete purchase of Kerikeri Road house. Had earlier failed to pay rent. Knights give notice to Kathryn Jenkins and Paul Gill to vacate by 13 March 1995 (Knight affidavit). Kathryn Jenkins leaves Kerikeri Road house about this time.

Late February 95 Paul Gill removes gas appliances from store at 63 Kerikeri Road and takes them to Puriri Park, Balls Road. (Kathryn Jenkins address given by Official Assignee) - (Knight affidavit).

10 March 1995 Kaikohe District Court makes order for substituted service on Paul Jenkins

11 March 1995 Paul Jenkins rings Hodgson and asks to move furniture from Kerikeri Road house to Broadwood (Hodgson affidavit).

12 March 1995 Knight sees Hodgson truck come to Kerikeri Road house and load furniture on to truck, contacts Hodgson and ascertains that Paul Gills has been moved to Broadwood, Kaitaia. (Knight affidavit). Hodgson moves Paul Jenkins furniture from Kerikeri Road house to Broadwood (Hodgson affidavit).

2 May 1995 Kaikohe District Court gives judgment to creditor against Paul and Kathryn Jenkins.

31 July 1995 Bankruptcy notice served on debtor who answers to Gill.

14 October 1995 Bankruptcy notice expires - act of bankruptcy committed.

28 September 1995 Bankruptcy petition and related documents served on Paul Gill who answers to names of Paul Gill, Paul McGill and Paul Jenkins. (Campbell affidavit)

cla2:mart1