IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-2691

IN THE MATTER OF	the Insolvency Act 2006
AND	
IN THE MATTER OF	the bankruptcy of HARRY MEMELINK Judgment Debtor
EX PARTE	SANCO (N.Z.) LIMITED Judgment Creditor

Hearing: 9 March 2009

Appearances: Ms. Morris-Lisette - Counsel for Judgment Creditor
H. Memelink in person

Judgment: 10 March 2009 at 3.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 10 March 2009 at 3.00 p.m. pursuant to r 11.5 of the High Court Rules.

Solicitors: Craig Griffin & Lord, Solicitors, PO Box 9049, Newmarket, Auckland

[1] The judgment debtor applies to set-aside a bankruptcy notice issued by the judgment creditor and claiming from him the sum of $3,185.35.

[2] This amount represents a default judgment obtained against the judgment debtor in the District Court at Lower Hutt on 24 October 2008 for $2,633.35 plus additional interest, costs and disbursements.

[3] The bankruptcy notice was served on the judgment debtor on 17 December 2008. An affidavit of service has been filed.

[4] On 23 January 2008 the judgment debtor filed in this Court an application to set-aside the bankruptcy notice. No affidavit in support of this application was filed at the time. Instead an affidavit in support sworn by the judgment debtor was filed on 27 February 2009.

[5] The judgment debtor's application to set-aside the bankruptcy notice was not served upon the judgment creditor until 28 January 2009.

[6] It appears that as yet, the affidavit of the judgment debtor in support of his present application has not been served upon the judgment creditor.

[7] Before me the judgment creditor raised a preliminary point. This was to the effect that the judgment debtor's application, although arguably filed in time, is effectively a nullity as first, it was not served within the required period and secondly and in addition, the supporting affidavit of the judgment debtor was not filed until over 1 month later and at no time has it been served on the judgment creditor.

[8] This point raised by the judgment creditor is based on the wording of s. 17(1)(d) *Insolvency Act 2006*. The relevant parts of s. 17 are:

> *"(1) A debtor commits an act of bankruptcy if –*
>
> ………

(d) The debtor has not, within the time limit specified in sub-section (4) –

(i) complied with the requirements of the notice; or

(ii) satisfied the Court that he or she has a cross-claim against the creditor.

……………

(4) The time limit referred to in sub-section (1)(d) is –

(a) If the debtor is served with the bankruptcy notice in New Zealand, 10 working days after service ……".

[9] Rule 24.10 *High Court Rules* sets out broadly matters relating to applications to set-aside bankruptcy notices before this Court. Those applications must follow the rules dealing with interlocutory applications.

[10] The form of the bankruptcy notice to be issued is required now to follow Form B2 in the *High Court Rules*. This notice is required to state in the notes to the judgment debtor:

> *"If you consider you have a counter-claim, set-off or cross demand against the judgment creditor that comes within paragraph 1(c), or you wish to seek the Court's approval of terms of payment, you must, within 10 working days from the date of receiving this notice, apply to the High Court. Your application must be supported by affidavits.*
>
> *You must, within the same time, also serve a copy of the application and supporting affidavit on the judgment creditor."*

[11] In the present case it is undisputed that although the judgment debtor's application to set-aside the bankruptcy notice was filed in time on 23 January 2009, the supporting affidavit of the judgment debtor was not filed until over one month

later on 27 February 2009 being out of time. In addition it also appears to be undisputed first, that the application itself was not served upon the judgment creditor within the 10 working day period specified in the bankruptcy notice and secondly, that the affidavit in support is still unserved. It is clear from judgments such as *Scott v ANZ Banking Group (NZ) Limited* (High Court, Rotorua, B133/89), 15 September 1989, *Gillon v Blueprint Developments Limited*, High Court, Auckland, B2164/89, 27 March 1990 and *Alexander v SH Locke (NZ) Ltd* (1998) 12 PRNZ 249 that once the tenth working day after service of a bankruptcy notice, not counting the day of service has passed, an act of bankruptcy occurs. Accordingly, provisions be they in the *Insolvency Act 2006* or elsewhere which provide for some extension of time for bringing and serving applications will not assist. Blankly put, they cannot undo an event which has occurred, namely the act of bankruptcy.

[12] It follows from these and other authorities that where an application (with the required supporting material) from a judgment debtor to set-aside a bankruptcy notice is filed after the tenth working day after service there is no jurisdiction for the Court to deal with that application.

[13] In my view, from the wording of the *Insolvency Act 2006* and the provisions in the required Form B2 for bankruptcy notices, it is clear that a judgment debtor has only 10 working days from the date of service upon him of the bankruptcy notice to apply to this Court to set it aside and this application must be supported by affidavit. In addition, within this same 10 day working period the judgment debtor is required also to serve *"a copy of the application and supporting affidavit on the judgment creditor"*.

[14] This has not happened in the present case. Even if the bare application itself was filed within the ten working day period after service of the bankruptcy notice it was not until one month later that the judgment debtor's supporting affidavit was filed. Further, neither the application itself nor the affidavit in support were served upon the judgment creditor within that 10 working day period.

[15] That said, there is no basis in law for me to deal with the judgment debtor's application to set-aside the bankruptcy notice. The application must be dismissed. An order to this effect is to follow.

[16] That effectively deals with the application before the Court. But, notwithstanding this conclusion, in passing I note that in any event the judgment debtor has put little independent evidence before the Court to support his contention that he has an arguable cross-claim here against the judgment creditor. Nor has he brought any application in the District Court to set aside the judgment upon which the judgment creditor's bankruptcy application is made.

[17] Although the judgment debtor's present application fails, a matter of concern I raised at the hearing of this application needs to be recorded and I now do so. This is the fact that the initial default judgment obtained against the judgment debtor in the District Court was for a balance claim of only $1,345.30, but together with costs, disbursements and interest, a total judgment of $2,633.35 was awarded. This judgment has now grown to $3,185.35, with additional interest, costs and disbursements claimed in the bankruptcy notice, added.

[18] Whilst this amount is significant I repeat two concerns I raised with the parties at the hearing of this matter that first, what started out as a relatively modest judgment on the claim of $1,345.30 has more than doubled and secondly, in any event the final amount involved here of $3,185.35 is still such that it scarcely warrants the major Court undertaking and time which is involved in this proceeding. I say this also bearing in mind the assurance the judgment debtor provided to the Court at the hearing of this matter that he has substantial assets and is entirely solvent.

[19] That said, the parties are urged to liaise to endeavour to reach some sensible settlement and conclusion of this matter.

[20] Notwithstanding these comments, however, the following orders and directions are now made:

(a) The judgment debtor's application to set-aside the bankruptcy notice fails.

(b) The judgment debtor is to have a further period of 5 working days from the date of this judgment to pay or satisfy the amount claimed from him in the bankruptcy notice totalling $3,185.35.

(c) The Registrar is directed that if or when the judgment creditor's bankruptcy application is filed in this Court, it is to be listed for call before me at the earliest opportunity.

(d) So far as costs are concerned, they are reserved at this point and will be dealt with on final disposal of the bankruptcy proceeding.

(e) Leave is reserved for any party to approach the Court further on 24 hours notice if additional directions may be required in the mean time.

'Associate Judge D.I. Gendall'