

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2008-404-8049

UNDER the Insolvency Act 2006
IN THE MATTER OF the bankruptcy of MARK PRINGLE
SPEEDY
BETWEEN RICHARD WILLIAM JACK
Judgment Creditor
AND MARK PRINGLE SPEEDY
Judgment Debtor

Hearing: 30 April 2009

Appearances: S Kilian for Judgment Creditor

Judgment: 30 April 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ROBINSON

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[1] Following the making of an order setting aside the bankruptcy notice both the judgment debtor and the judgment creditor seek costs. The bankruptcy notice was issued following the obtaining of a judgment by the judgment creditor requiring the judgment debtor to pay \$95,625.38 and costs. That judgment was obtained in December 2008. It appears from the documents placed in front of me that the judgment was based on an allegation of an advance of that amount from the judgment creditor to the judgment debtor. Following the issue of the judgment, the judgment creditor as he was entitled to proceeded to issue a bankruptcy notice. When that notice was served, the judgment debtor applied to set the notice aside and brought proceedings to set aside the default judgment obtained in the District Court.

[2] In those circumstances counsel properly agree that the application to set aside the bankruptcy notice would need to await the outcome of the application to set aside the default judgment obtained in the District Court. The application to set aside the District Court judgment was dealt with on 20 April 2009 and was granted. However, in granting the application the Judge commented on the judgment debtor's failure to take steps to defend the proceedings and accordingly ordered costs against the judgment debtor.

[3] It appears from the judgment that the proceedings as originally drafted were misconceived and at the hearing of the application to set aside the default judgment counsel for the judgment creditor accepted that there was some mistake in their accounting and that on the evidence available the most he could be entitled to at that stage was judgment for a \$45,000 loan.

[4] It also appears from the District Court judgment and the evidence before me that the judgment debtor and judgment creditor were involved in development of property possibly as partners and that there was an unresolved issue as to the division of the assets of the partnership and accounting arising out of the dissolution of the partnership.

[5] In support of the application for costs brought by the judgment creditor, it is emphasised that it was only after the bankruptcy notice was served that the judgment

debtor decided to apply to set aside the default judgment. Consequently, it is submitted that the judgment creditor should be entitled to the costs involved in issuing of the bankruptcy notice and also costs involved in attendance today including costs involved in attendance at this application for costs. Whilst it is conceded that the making of the order setting aside the bankruptcy notice prima facie establishes that the judgment debtor should be entitled to costs, it is submitted that because of the unusual circumstances there are good grounds for the Court departing from that general rule and making an order for costs in favour of the judgment creditor. On the other hand the judgment debtor whilst offering no opposition to an order that there be no costs resists any application by the judgment creditor for costs.

[6] In the circumstances I have outlined there clearly is some fault on the part of the judgment debtor in failing to take steps to set aside the default judgment. There is therefore some merit in the judgment creditor's claim that the judgment debtor should not be entitled to costs on this application to set aside the bankruptcy notice. However, it also appears to me that in so far as the bankruptcy notice was based on a judgment that has now been set aside there is some merit in the judgment debtor's submission that the judgment debtor shouldn't have to pay any costs incurred in the issue of the bankruptcy notice. Of course it could be said that had the judgment creditor not issued the bankruptcy notice, the judgment debtor might still have decided to do nothing. It was the issue of the bankruptcy notice that prompted the judgment debtor to do something about the judgment that had been entered against him.

[7] On the other hand, however, the judgment creditor is not entirely without fault because it seems to me on the information available that the claim brought by the judgment creditor was misconceived. Had the claim been properly based which would have included an order for the taking of accounts on the dissolution of the partnership, then the judgment debtor probably would have had no defence and no grounds for seeking an order setting aside the judgment.

[8] In the circumstances therefore, I conclude that there are reasons here why the judgment debtor should not get any costs in connection with his successful application to set aside the bankruptcy notice but I am not satisfied that there are any

grounds to make an order for costs in favour of the judgment creditor in the setting aside of the bankruptcy notice. Consequently, I have decided that there should be no order for costs for the reasons I have just given.

Associate Judge Robinson