

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

CIV-2008-404-006193

IN THE MATTER OF the Insolvency Act 2006

BETWEEN EDWARD KANG
 Judgment Debtor

AND DAVID TONY BROWN AND JENNIFER
 MARY BROWN
 Judgment Creditor

Hearing: 11 May 2009

Appearances: J D McBride for the Judgment Creditor
 A Ram for the Judgment Debtor

Judgment: 11 May 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

Solicitors/Counsel:

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[1] In opposition to the judgment creditors' application to adjudicate Mr Kang bankrupt, he opposes on the grounds:

- a) He was not mentally able to defend the summary judgment proceedings when judgment was entered against him.
- b) He received inadequate legal advice.
- c) He has a valid counter-claim, set-off, or cross-demand.

Background

[2] The grounds for the summary judgment proceeding concern the unpaid final instalment of a deposit for the purchase of the judgment creditors' property at 47 Market Road, Remuera. Mr Kang purchased the property. He paid the two initial instalments of a deposit of \$150,000. He failed to pay the final instalment of \$100,000.

[3] Mr Kang was represented by a firm of lawyers when filing his notice of opposition and affidavit in opposition to the application for summary judgment. The only ground raised by the opposition was his claim that it was not he but his company who was the purchaser. Therefore, he was not a party to the agreement.

[4] The matter was allocated a hearing date of 2 September 2008. Previously on 7 August 2008 his solicitor's applied for leave to withdraw. In support of that application it was deposed that Mr Kang had not supplied his solicitors with instructions in respect of the proceeding since 24 April 2008. Further, he had a number of long outstanding accounts owed to his solicitors and had been warned they would no longer act for him if those accounts remained unpaid.

[5] The solicitor's application to withdraw was granted on 2 September 2008. At that time Mr Kang represented himself. He requested an adjournment, but this application, after consideration by Judge Robinson, was refused. The Learned Judge

then rejected the opposition to the summary judgment application and entered judgment in the sum of \$100,000 together with costs and interest.

[6] On 26 September 2008 a bankruptcy notice was served on Mr Kang. In response he filed an application to set aside the bankruptcy notice, and an affidavit in support. In his affidavit he alleged:

- a) He was in a financial crisis as a property developer and unable to afford a lawyer. Therefore the hearing was unfair to him and he intends to file an appeal against the judgment.
- b) He had been misled by the judgment creditors as they had subsequently offered the property for sale at a significantly lower price than it was offered to him.

[7] When Mr Kang did not appear when his application was called it was struck out. Likely the application would have been struck out even if Mr Kang did appear. A claim that the value of the property was misrepresented to him, because it was later sold at a lesser sum than he paid, does not amount to a counter-claim, set-off or cross-demand. Moreover, it appears no appeal was filed, when arguably he was still within time to do so.

[8] When subsequently the vendors' adjudication application was served Mr Kang filed a notice of opposition and affidavit in opposition to it. Those papers did not raise the usual grounds provided for in section 37 of the Insolvency Act 2006. Rather his opposition highlights his concerns with aspects of the agreement he entered into to purchase the judgment creditors' property. He said the property is one of two introduced to him by Ms Megan Jaffe, the judgment creditors' real estate agent. Throughout, he said it was represented to him that the property was a 4 unit site. He said he was advised there would be no problems in obtaining resource consent for redevelopment. He said he was actively "delayed and discouraged" from going onto the site prior to the contract becoming unconditional. He has annexed an email from Ms Jaffe describing the property as "a 4 unit site with an old home on one of the properties".

[9] Mr Kang wished to gain access to the property for development enquiry purposes but it appears was not permitted because he had been late with the payment of the second deposit instalment, and had not at all at that stage endeavoured to pay the third instalment.

[10] On 1 November 2007 his design representative reported his development proposals would encounter difficulties due to the need to obtain resource consent to remove or demolish the existing house on the site. Mr Kang's affidavit provides copies of relevant documents in support of his various claims.

[11] On 7 November 2007 the judgment creditors cancelled the contract due to non-payment of the balance of deposit.

[12] Mr Kang's affidavit concludes that when the summary judgment application was heard he "was mentally not able to defend the proceedings and hence was not able to focus on the proceeding filed against me". Further "I unfortunately got inadequate legal advice throughout the initial legal proceedings and therefore did not adequately comply with the requirements of any notice".

[13] He continues to maintain that he has a valid and enduring counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt.

Considerations

[14] Mr Kang does not explain nor provide evidence of his being "mentally unable to defend" the summary judgment proceeding. If such was then available it may have provided a ground for appeal, but no appeal was filed against the order for summary judgment.

[15] The sole ground pursued in defence of the summary judgment application is that Mr Kang was not the purchaser.

[16] His papers filed in support of his application to set aside the bankruptcy notice made no mention of matters now raised in opposition to the adjudication application.

[17] Over time Mr Kang's line of defence has changed. He blames previous lawyers for this. He also blames his mental state. He says he has a counter claim against the judgment debtors and their agent and this has always been the case, albeit he has raised it for the first time in defence of the adjudication application.

[18] Curiously, only at this stage has a claim of counter-claim been raised. The evidence offered is not insignificant. There is evidence of his intentions to pursue a development of the property he agreed to buy. Also the contract did contain a provision permitting him access to the property for purposes related to a proposed future development. Notably the agreement contains the address details of the solicitors then acting for him.

[19] Of course the evidence now provided which suggests, he says, that the development potential was misrepresented to him, is in fact sufficient only to suggest there may have been a course he could have pursued, but has not done that before now.

[20] What Mr Kang is referring to are matters which could have been raised previously by way of defence. They are not matters which section 37 of the Insolvency Act permits consideration of upon an adjudication application.

[21] There is no evidence Mr Kang is able to pay the judgment debt. There remains no proper basis for the Court to resist the order sought.

[22] There is an order adjudicating Mr Kang bankrupt. The time of that order is 10:30am.

[23] The judgment creditors' costs shall be awarded on a category 2B basis, together with disbursements approved by the Registrar.

Associate Judge Christiansen