

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

**CIV 2009-404-002455**

BETWEEN XINGRONG ZHOU ALSO KNOWN AS  
CATHLEEN ZHOU  
Judgment Debtor

AND ROSEBANK ROAD NOMINEE  
LIMITED  
Judgment Creditor

Hearing: 23 June 2009

Appearances: R B Hucker for Judgment Creditor  
X Zhou in person

Judgment: 23 June 2009

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**ORAL JUDGMENT OF ASSOCIATE JUDGE ABBOTT**

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Solicitors:  
Hucker & Associates, PO Box 3843, Shortland Street, Auckland 1140

And to:  
X Zhou, 30A Fontenoy Street, Mt Albert, Auckland 1025

[1] The judgment creditor has applied for an order adjudicating Xingrong Zhou bankrupt. The application is made on the basis of non-compliance with a bankruptcy notice served on Ms Zhou on 30 April 2009. That bankruptcy notice sought payment of a judgment obtained by the judgment creditor in the District Court at Auckland on 24 February 2009 for the sum of \$35,210.01.

[2] The application was listed for call in the bankruptcy list at 10:45 am this morning. Ms Zhou did not appear. I made an order adjudicating her bankrupt, having been satisfied that the creditor was entitled to that order.

[3] Since the making of the order, Ms Zhou has approached the Registrar and advised that she was not present when the application was called as she had gone to the District Court at Auckland in error. I accepted that application and arranged for counsel for the creditor to be contacted. I am indebted to Mr Hucker for responding promptly and attending Court again early this afternoon.

[4] In light of Ms Zhou's explanation as to her non-appearance, I have recalled the order for adjudication made this morning and heard from both Ms Zhou and Mr Hucker afresh, essentially as to whether I should allow Ms Zhou the opportunity to defend the application.

### **The background**

[5] Ms Zhou has not taken any steps to date to defend this application, nor indeed the underlying District Court judgment. However, faced with bankruptcy, she has raised an objection to what she considers is an unfair position that she now finds herself in.

[6] The debt, which the judgment creditor claims, arises out of a lease of commercial premises in Rosebank Road, Avondale owned by the creditor. A company in which Ms Zhou has an interest took a lease of the creditor's premises in late 2007. Ms Zhou has guaranteed the obligations under the lease. Ms Zhou says that the company intended to operate a café business but it did not open because a very large competing business opened in adjoining premises. She made the decision

(which seems to be a realistic one) that her business had no prospect of competing against the larger premises next door.

[7] Ms Zhou informs me that she approached the landlord seeking an agreed cancellation of the lease (which had a five year term) but the landlord was unwilling to cancel. She states that she attempted to find a replacement tenant but has been unable to do so.

[8] She accepts that the rent and operating expenses for which judgment was entered in February are due in terms of the lease but says that it is unfair to place this liability on her in the circumstances. Underlying this sense of unfairness is her belief that a resource consent was needed for the development of the property next door and the creditor should have been notified of the application for that consent. However, she also said that she did not believe that the landlord would have known of the competing business at the time that she and her company entered into the agreement to lease. (I understand that this preceded the signing of a formal lease by a considerable time).

### **Potential issues arising out of this background**

[9] I have given consideration to whether the matters raised by Ms Zhou could constitute a basis for the defence to the underlying summary judgment, or grounds for declining to exercise the Court's discretion on the present application for adjudication so as to justify affording her an opportunity to apply to set the judgment aside. I will deal with each in turn.

### **The underlying judgment**

[10] The District Court judgment was obtained by default. Mr Hucker informs me that it was only in respect of six to seven month's rent and for operating expenses presumably for a similar period. It appears that the premises remained empty through that period (and may still be empty).

[11] Ms Zhou mentioned two matters that could possibly give rise to a defence, if supported by relevant facts. The first is whether the creditor in fact had knowledge of the opening of a café in the adjoining premises (once constructed) which might have amounted to a misrepresentation by omission. Ms Zhou was unable to support this contention. Indeed, she was very frank in stating her belief that the landlord did not know of the competing business at the time that the parties entered their agreement to lease. This makes commercial sense. There would be no commercial reason for a landlord to enter into a five year lease with a party wishing to open a small café business, knowing that a very large competitor was likely to commence business in adjoining premises and would be likely to swamp the business of the prospective tenant.

[12] The second matter is the possibility that the creditor may have voluntarily surrendered the lease. Nothing that Ms Zhou said as to the background circumstances leads me to the belief that there can be any evidential basis for this proposition.

[13] Having listened carefully to Ms Zhou, and considered the implications of her view of events, I cannot see that any of the matters about which she is concerned could give any bona fide grounds for defence of the creditor's judgment. I also take into account that Ms Zhou did not take steps at the time to defend the judgment.

### **The present application**

[14] I turn now to consider factors relevant to the exercise of my discretion on the present application for adjudication.

[15] I have already mentioned that Ms Zhou accepts that the creditor is entitled to its judgment in accordance with the terms of the lease. There is also no doubt that she has failed to pay pursuant to the demand made by the bankruptcy notice. That raises a prima facie presumption in favour of the creditor, on the basis of which it is entitled to an order.

[16] Mr Hucker very properly referred me to the only ground that appeared to be available to Ms Zhou, being an argument that her present circumstance arises out of economic circumstances beyond her control. This was found to be a basis for declining an order for adjudication in *Re Taylor* (1992) 4 NZBLC 102, 875. The underlying rationale there was that the Judge could not find any public interest element that would be served by making the debtor in that case bankrupt. It was an element of that case that the debtor was insolvent through no fault or foible of his own.

[17] Although I have sympathy for Ms Zhou in the way that events transpired, I do not see this as a case where she has no responsibility for the outcome. It is clear from what I heard today that she entered into the lease agreement freely and after considering the potential for competitors in the area. I accept that she did not know of the large café opening immediately next door, but competition must always be an element which a party needs to accept as a possibility in setting up any business. She chose to enter into a relatively lengthy lease. Whilst she no doubt would not have anticipated the timing and strength of the competition, that was not to say that it would not occur to some degree and at some point in time.

[18] There is also a further factor which I believe warrants an order for adjudication in this case. Ms Zhou has been examined as to her means in the District Court, since the judgment. That examination was before a Registrar. The Registrar has come to the view that an order for a summary instalment order should not be made. Ms Zhou has confirmed to me today that she has no assets and no ability to meet the debt of \$35,000. That debt, although perhaps a major commitment for her, is not necessarily a major financial commitment (in a wider commercial sense) in relation to a business which was anticipated to run for five years and more. Mr Hucker informs me that the business was to be run through a limited liability company. The landlord was committed just as much as Ms Zhou was by the agreement to lease. It too should be entitled to examine the financial support that was available for this business.

[19] Weighing all of these matters, I have come to the view that the matters raised by Ms Zhou are not a sufficient basis to justify denying the creditor the order for adjudication which it is otherwise entitled to have.

[20] The order for adjudication made at 10:53am this morning is recalled and rescinded. I make a further order now adjudicating Ms Zhou bankrupt. This order is made at 1:48pm.

[21] The creditor is entitled to costs. Ms Zhou is to pay costs on a 2B basis, together with disbursements as fixed by the Registrar.

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**Associate Judge Abbott**