IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2009-419-001065

BETWEEN	THE OFFICIAL ASSIGNEE IN BANKRUPTCY OF THE PROPERTY OF ALLEN MARTIN ROUNTREE AND RAEWYN MARY ROUNTREE (BANKRUPTS) Plaintiff
AND	GORDON ISRAEL Defendant

Hearing: 17 November 2009

Counsel: PJ Morris for plaintiff

Appearance: G Israel, defendant

Judgment: 18 November 2009 at 4:30 pm

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for summary judgment against defendant]

Solicitors: Stace Hammond, PO Box 19 101, Hamilton for plaintiff

And to: G Israel, 124 Wharepoa Road, RD 4, Hikutaia

[1] The plaintiff is the Official Assignee and assignee in bankruptcy of the property of Allen Martin Rountree and Raewyn Mary Rountree.

[2] Allen Martin Rountree and Raewyn Mary Rountree were adjudicated bankrupt in the High Court at Hamilton on 3 December 2007. The orders were made on the application of the Commissioner of Inland Revenue.

[3] The Official Assignee applies for summary judgment against the defendant. Summary judgment is sought for $129,549.05 plus interest and costs.

[4] The Official Assignee brings this proceeding in reliance on s 42 of the Insolvency Act 1967. Section 42 applies by virtue of the transition provisions contained in s 444 of the Insolvency Act 2006. Section 42 vests in the Official Assignee in Bankruptcy the bankrupt's property.

[5] The plaintiff's application seeks summary judgment. My jurisdiction to consider such an application is contained in s 26I(1)(a) of the Judicature Act 1908. This section does not provide any restriction on an Associate Judge's jurisdiction in summary judgment matters: *Cordova v Wenzel & Ors* HC AK CIV 2005-404-3120 22 December 2005 Venning J. I record this position out of an abundance of caution because a mention was made of a possible jurisdiction challenge prior to the hearing commencing.

The Court's approach to a plaintiff's summary judgment application

[6] I set out a short summary of the general approach which the Court takes in relation to a summary judgment application by a plaintiff. That general approach does not seem to have been altered by the change in wording which has been introduced with r 12.2. Rule 12.2, as did its predecessor r 136, requires that a plaintiff satisfy the Court that the defendant has no defence. The former Rule said:

> No defence to a claim in the statement of claim or to a particular part of any such claim.

The current Rule says:

> No defence to any cause of action in the statement of claim or to a particular cause of action.

[7] The no defence position and the obligations that the Rules impose on the parties have been examined in a number of authorities. In *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 the Court of Appeal said as follows:

> In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence.

[8] The Court added at 4:

> Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty. ...

[9] And further at 4:

> Where the only arguable defence is a question of law which is clear cut and does not require findings of disputed facts or the ascertainment of further facts, the Court should normally decide it on the application of summary judgment, just as it will do on an application to strike out a claim or defence before trial on the ground that it raises no cause of action or no defence.

[10] The Court also commented on the position where a defence is not evident on a plaintiff's pleading and said at 3:

> If a defence is not evident on the plaintiff's pleading I am of opinion that if the defendant wishes to resist summary judgment he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence.

[11] That position was further reinforced in *Australian Guarantee Corporation (New Zealand) Ltd v McBeth* [1992] 3 NZLR 54 at 59 where the Court said:

> Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not, the plaintiff's verification stands unchallenged and ought to be accepted unless it is patently wrong
>
> > "No defence means 'no bona fide defence, no reasonable ground for defence and no fairly arguable defence'."

[12] Hypothetical possibilities in vague terms, unsupported by any positive assertion or corroborative documents advanced by defendants will not frustrate the obligation on a plaintiff to discharge the onus of proof: *SH Lock (NZ) Ltd v Oremland* HC AK CP641/86 19 August 1986.

[13] The Court of Appeal in *Tilialo v Contractors Bonding Limited* CA50/93 15 April 1994 at 7 raised a caution and said:

> The Courts must of course be alert to the possibility of injustice in cases in which some material facts to establish a defence are not capable of proof without interlocutory procedures such as discovery and interrogatories. That does not mean that defendants are to be allowed to speculate on possible defences which might emerge but for which no realistic evidential basis is put forward.

[14] A Court is not required to accept uncritically any or every disputed fact: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341. However the Court will not reject even dubious affidavit evidence, even though there must be suspicion as to the good faith of the deponent, if there is an essential core of complaint that supports a defence. In essence, the inquiry is whether or not the person's assertion passes the threshold of credibility: *Pemberton v Chappell*; *Orrell v Midas Interior Designs* (1991) 4 PRNZ 608 at 613.

[15] In *Tilialo v Contractors Bonding Limited* the Court of Appeal at 8 observed:

> Drawing the line between mere assertions of possible defences and material which sufficiently raises an arguable defence so that the defendant should not be denied the opportunity to employ interlocutory procedures and have a trial is a matter of judgment. Views may well differ.

[16] The authorities have also referred to a residual discretion as to whether judgment should be entered. Although, as expressed by Casey J in *Pemberton v Chappell* at 5 it is difficult:

> To conceive of circumstances where the Court should not give judgment for the plaintiff … It can only be a discretion of the most residual kind.

The discretion was the subject of comment in *Waipa District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 298 at 303.

[17] The plaintiff's application is made on reliance on a statement of claim which pleads three alternative causes of action.

[18] Under the first cause of action the plaintiff alleges that the proceeds of sale of Mr and Mrs Rountree's house was paid to the defendant as a loan. It is alleged that the loan is due and payable to the Official Assignee.

[19] Under the second cause of action it is pleaded that the proceeds of sale of Mr and Mrs Rountree's house were used by the defendant to purchase a property in circumstances where the Official Assignee may call in aid s 55 of the Insolvency Act 1967. An order for repayment of the moneys so obtained by the defendant is sought with consequential orders if there is a default.

[20] The third cause of action alleges that the payment of the proceeds of sale of the home of Mr and Mrs Rountree were made with Mr and Mrs Rountree's consent and for the purpose of alienating property, namely, the fund with intent to defraud Mr and Mrs Rountree's creditors. This cause of action relies on s 60 of the Property Law Act 1952. An order for repayment of the funds so paid to the defendant is sought under this cause of action.

Background

[21] On 21 November 1996 Mr and Mrs Rountree became the registered proprietors of a property at 4A Mayfair Street, Tauranga. On 6 March 1998 they mortgaged the property in favour of Trapski Dowd Securities Limited. On 7 January 2007 they granted the defendant an option to purchase 4A Mayfair Street.

[22] On 5 February 2007 Mr and Mrs Rountree and the defendant signed a sale and purchase contract in respect of 4A Mayfair Street, Tauranga. The Rountrees were the vendor and the defendant was the purchaser. The purchase price was $311,500.

[23] On 13 February 2007 the defendant onsold the property to JM Chand or nominee for $337,000.

[24] On 19 February 2007 the property was conveyed by Mr and Mrs Rountree to the defendant. On the same day the defendant conveyed the property to JM Chand and AK Chand.

[25] On 19 February 2007 Ross Aiken, a lawyer acting on the defendant's instructions paid $183,162.51 from the proceeds of sale to Trapski Dowd Securities Limited in discharge of the mortgage. Mr Atken then paid the balance, $153,531.84, to the defendant. The defendant deposited a bank cheque for $153,531.84 into an account at the BNZ Nelson branch in his name and that of Mai Ling Juliana Mui.

[26] On 22 February 2007 the defendant and Juliana Israel signed a deed of debt in favour of Mr and Mrs Rountree in favour of Mr and Mrs Rountree as trustees of the "Alpine" Group. The deed of debt acknowledged a debt of $113,000.

[27] The Official Assignee utilised his powers under the Insolvency Act 1967 and examined the two bankrupts, Mr and Mrs Rountree, and also the defendant.

[28] It is not necessary for me to review in this judgment the admissions specifically made in the course of the examinations of Mr and Mrs Rountree and the defendant. That is because in the course of the hearing of the summary judgment application Mr Morris responsibly acknowledged that he could only seek summary judgment for part of the debt claimed about which there was no contest in the sum of $104,381.06. That sum was ascertained by reference to the deed of debt just referred to in the sum of $113,000 and a number of payments that are recorded in paragraph 19 of the statement of claim from 22 February 2007 to 10 January 2008 and which total $8,618.94.

[29] Mr Morris acknowledged that the proper course was to leave the balance of the debt for determination in a proceeding in the ordinary way. He invited me to enter judgment on the second cause, that is the cause of action which relies on s 55 of the Insolvency Act 1967.

[30] Because the causes of action are alternative I consider the second cause of action upon which the plaintiff primarily relies.

[31] Section 55 of the Insolvency Act 1967 provides:

> **55 Proceedings where bankrupt has improved property of another person**
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> (1) Whenever a person has, without adequate consideration in money or money's worth, erected buildings upon or otherwise improved land or any other property of another person, or has purchased land or other property in another person's name, or has provided money to purchase land or other property in the name or on behalf of another person, or has paid instalments for the purchase or towards the purchase of any land or other property in the name or on behalf of another person, then, if the value of the assets of the first-mentioned person has been reduced thereby, and if—
>
> (a) The first-mentioned person is adjudged bankrupt within 2 years thereafter; or
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> …
>
> subject to the provisions of subsection (3) of this section, the provisions specified in subsection (2) of this section shall apply.
>
> (2) The provisions which shall so apply are as follows:
>
> (a) The Court may, on the application of the Assignee, ascertain the value of the improvements, or the amount expended or paid upon or for the land or other property, by or on behalf of the bankrupt (including any payments of legal expenses, interest, rates, and other expenses or charges), and may order the other person to pay the amount so ascertained to the Assignee:
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> (b) If the other person fails to comply with the order, the Court, by the same or a subsequent order, may (in addition to any other power it may have to enforce compliance with the order) direct the Assignee to sell the whole or a sufficient part of the land with improvements thereon or of other property, and to convey or transfer the same to the purchaser; and the Court may make all vesting or other orders necessary for that purpose:
>
> (c) The Assignee shall retain the whole or so much of the amount so ascertained as is necessary, along with all other assets in the estate, to pay the creditors in full (including the payment of interest under section 104 of this Act), and any balance of the amount shall be paid to the other person. Where any money has been retained by the Assignee under this paragraph and the creditors have been paid in full, any surplus of the proceeds of the bankrupt's estate shall be paid to the said other person to the extent of the amount so retained before any payment is made to the bankrupt.
>
> (3) The Court may refuse to make an order for the payment of the amount calculated in accordance with paragraph (a) of subsection (2)

> of this section, or may make an order for the payment of such lesser amount as the Court thinks fit if—
>
> (a) The other person mentioned in that subsection acted in good faith and has altered his position in the reasonably held belief that the bankrupt's action was valid and would not be set aside; and
>
> (b) In the opinion of the Court it is inequitable to order payment of all or any part of the amount, as the case may be.

[32] There is no dispute as to the following facts, namely:

a) The defendant received the net sale proceeds from the sale of the bankrupts' home;

b) Those sale proceeds were paid into his bank account at Nelson;

c) On 28 April 2008 the defendant became the registered proprietor of a property situated at Wharepoa Road, RD 4, Hikutaia. That property was acquired from and Mr and Mrs Benton. The defendant paid from his bank account $125,000 as the house deposit. The defendant's bank account has been produced and it is clear that the payment of the deposit was only possible because of the receipt of the funds from the sale of Mr and Mrs Rountree's home;

d) Mr and Mrs Rountree confirmed that the money advanced to the defendant was used by him to buy a house;

e) The defendant acknowledges that the moneys given to him as a result of the sale of Mr and Mrs Rountree's house was used by him to buy his house;

f) The money was provided within two years of Mr and Mrs Rountree being adjudicated a bankrupt;

g) There is no consideration for at least $104,381.06 of the funds used by the defendant and acquired by him; and

h) The assets of Mr and Mrs Rountree have been reduced by at least $104,381.06.

[33] The above summary of facts establishes all the requirements for the application of s 55 of the Insolvency Act 1967 to this case. There are no circumstances or factors which justify not ordering the defendant to pay the sum of $104,381.06.

[34] Section 55(2)(b) provides a default provision in the event that payment of the sum established to be due is not made. Mr Morris invited me to make an order in terms of subs(2)(b) to provide for the vesting of the property that was acquired by the defendant in the Official Assignee and for a sale to then take place, if payment was not made within two months of the served copy of this judgment. The form of order which he proposed was given to Mr Israel to consider and to advance any submission on if he saw fit. Mr Israel advised me that he could not consent to the order for sale but could not make any specific submission in relation to the proposal that was advanced by Mr Morris.

[35] I consider the orders sought by Mr Morris, with modification, are in fact justified in terms of s 55 of the Insolvency Act 1967 and that, then, is the reason why at the conclusion of this judgment orders to that effect have been made In addition, because there are parts of this case which have not been the subject of summary judgment, as indeed is permitted by r 12.2 of the High Court Rules, it is necessary that I give specific directions for the balance of the claim pursuant to r 12.12 of the High Court Rules. That, then, is the reason for consequential orders being included in the judgment which I now enter.

[36] I add a brief comment on the question of costs. I invited submissions if Mr Israel or, for that matter Mr Morris, considered costs calculated based on Category 2 Band B were inappropriate. Neither took up that invitation. In my view, the appropriate quantum of costs is therefore that which is calculated pursuant to Category 2 Band B.

Judgment and orders

[37] The following judgment and orders are made:

a) Judgment is entered against the defendant on the second cause of action for $104,381.06;

b) If $104,381.06 is not paid to the plaintiff by the defendant within two calendar months of this judgment, the plaintiff is directed to sell the property at 124 Wharepoa Road, RD 4, Hikutaia (more particularly described as Lot 1 Deposited Plan 89757 (South Auckland) as recorded in Certificate of Title SA71A/194;

c) In the event a sale is required, the plaintiff shall first file and serve a memorandum which provides the Court with the following:

    i) The method of sale proposed, ie tender, auction or listing for the purpose of securing offers;

    ii) The real estate agency company proposed to be instructed;

    iii) The suggested reserve price or asking price;

d) Leave is reserved to the plaintiff to seek for further directions in respect of such sale;

e) Subject to the Court approving the method of sale the plaintiff is authorised to execute all such documents as are necessary to vest such property in the purchaser;

f) The proceeds of sale shall be applied in the following priority:

    i) Payment of costs arising from the sale;

    ii) Payment to the plaintiff of the sum of $104,381.06;

iii) Payment of the balance, if any, to the defendant;

g) The plaintiff shall file and serve an amended statement of claim by 1 March 2010;

h) The defendant shall file and serve a statement of defence to the amended statement of claim by 12 April 2010; and

i) A case management conference by telephone shall be held with counsel and Mr Israel, if he has not appointed counsel, at 9.30am on 19 April 2010. The following matters will be addressed:

i) The issues remaining for resolution at trial;

ii) Any outstanding interlocutory order or direction required;

iii) Settlement;

iv) trial duration, the fixing of a trial date and the making of any special trial directions that are required.

Memoranda shall be filed by counsel and Mr Israel, if he is unrepresented, two working days before the conference dealing with the above matters.

Costs

The plaintiff is entitled to costs in relation to the summary judgment application based on Category 2 Band B. Accordingly I order that the defendant pay costs based on Category 2 Band B together with disbursements as fixed by the Registrar.

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JA Faire
Associate Judge