Date: 20081121

Docket: T-290-08

Citation: 2008 FC 1306

Ottawa, Ontario, November 21, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

STEPHEN ANTHONY EDELL

Plaintiff

and

HER MAJESTY THE QUEEN (Canada Revenue Agency),
THE SUPERINTENDENT OF BANKRUPTCY
and RISMAN & ZYSMAN INC.

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] This proceeding is an action commenced by the Plaintiff, Stephen Edell, against Canada Revenue Agency (CRA), the Superintendent of Bankruptcy (the Superintendent), and Risman & Zysman (the Trustee) for, among other things: an order requiring the CRA to accept his proposal pursuant to the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (the Act), a stay of the deemed bankruptcy under s.57 of the Act, and damages.

[2] The Plaintiff alleges that the CRA acted in a malicious manner with reckless disregard for commercial reasonableness, for the recommendation of the Trustee, and for its duties as a public agency. He alleges that he has incurred damages and will continue to incur damages due to the unlawful conduct of the CRA.

[3] The Plaintiff also named the Superintendent and Trustee as Defendants for the stated purpose of providing them with notice of the proceedings and ensuring they would be bound by orders of the Court.

[4] The CRA and the Superintendent filed motions on June 2 and 3, 2008, respectively, to strike the Plaintiff's Statement of Claim because it does not disclose a reasonable cause of action.

[5] The Plaintiff also filed a motion on June 20, 2008 seeking an interim stay of the deemed assignment into bankruptcy pending final determination of this action on its merits and also seeking Court directions concerning his payment obligations during the course of the action.

Issue

[6] The main issues to be determined in the three motions are:

a. *Is it plain and obvious that the Plaintiff's Claim discloses no reasonable cause of action?*

b. Should a stay of the deemed assignment provision section 57 of the Act be issued by this Court.

Background

[7] The Plaintiff is indebted to the CRA for outstanding income taxes (inclusive of interests and penalties) and Goods and Services taxes. On January 24, 2008, the Plaintiff made a formal proposal (the Proposal) pursuant to section 50 of the Act listing. CRA was his sole creditor.

[8] The Plaintiff proposed to settle the debt he owed to the CRA for a payment of $75,000.00 over four years; a sum that was less that his total indebtedness to the CRA. In making the Proposal, the Plaintiff had the assistance of the Trustee, who recommended that the CRA accept the Proposal.

[9] The meeting of creditors stipulated by the Act was scheduled for February 20, 2008. The CRA delivered its Proofs of Claim and its Voting Letter setting out its vote against the Proposal on February 18, 2008. As a result of the vote against by the CRA, the Proposal failed.

[10] By operation of section 57(a) of the Act, the Plaintiff was deemed to have made an assignment in bankruptcy. The section states:

> 57. Where the creditors refuse a proposal in respect of an insolvent person,
>
> (a) the insolvent person is deemed to have thereupon made an assignment;

Submissions

[11] The Plaintiff alleges that the failure of the CRA to accept his Proposal was unlawful, contrary to its duties as a public official, and a violation of public policy. He submits that the CRA

is required to conduct its affairs and exercise its discretion in a commercially reasonable manner, in good faith and in the public interest. He submits that the CRA owes a higher and more objective standard of care than other creditors because it must act in the public interest.

[12] The Defendant Superintendent submits that the Act is a complete code for dealing with bankruptcy and insolvency matters, and that the Superintendent is responsible for supervising the administration of all estates and matters the Act applies to.

[13] The Defendant Superintendent notes that under section 183(a) of the Act the Ontario Superior Court of Justice has jurisdiction at law and in equity to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings in this province. Accordingly, it argues that the Federal Court does not have jurisdiction to hear this case because the jurisdiction lies exclusively with the Ontario Superior Court of Justice.

[14] Furthermore, the Defendant Superintendent submits that pursuant to section 71 of the Act, once an assignment in bankruptcy has been filed, the bankrupt ceases to have any capacity to dispose of or deal with their property. Pursuant to section 181 of the Act, if the debtor does not believe that the assignment into bankruptcy ought to be filed they can apply to the court with jurisdiction to have the bankruptcy annulled.

[15] There is no authority under the Act to stay the deemed assignment into bankruptcy. Rather, the bankrupt can apply to have the bankruptcy annulled, or bring its concerns to the official receiver

for adjudication. The Defendant Superintendent argues that the bankrupt no longer has any right to bring an action in damages.

[16] Finally, the Defendant Superintendent argues that the Plaintiff must first seek leave from the Ontario Superior Court of Justice to bring an action against the Superintendent and the Trustee as required by section 215 of the Act.

[17] The Defendant CRA submits that there is no stay available to the Plaintiff against the operation of statute, that there is no cause of action in tort or negligence, and there are no damages that were suffered by the Plaintiff. Furthermore, the Defendant CRA submits that the only way to challenge the Defendant CRA's decision is by judicial review, which the Plaintiff chose not to do.

[18] The Defendant CRA submits that there is no provision in the Act to stay the effect of section 57 and that, while the *Federal Courts Act*, R.S., 1985, c. F-7 permits this Court to stay proceedings, it contains no provision authorizing it to stay the effect of statutory provisions. Even the Ontario Superior Court of Justice, which has exclusive jurisdiction in bankruptcy matters, cannot exercise that jurisdiction if it conflicts with the provisions of the Act.

[19] The Defendant CRA submits that it has done nothing unlawful in voting down the Proposal. Rather, it carried out its duties in accordance with the Act. The CRA filed its Proofs of Claim and voted on the Proposal using the Voting Letter as it was permitted to do under the Act. The Act does not require: creditors to attend the meeting; to enter into negotiations; or to accept the Trustee's

recommendation. Therefore, the Defendant CRA submits that it cannot be liable for any damages suffered by the Plaintiff under the tort of public misfeasance.

[20] The Defendant CRA submits that it did not act negligently in declining the Plaintiff's Proposal. For the CRA to have a duty of care to the Plaintiff giving rise to negligence there would have to be a sufficiently close relationship between the parties, and no public policy reason to limit or negate the duty owed to him. The Defendant CRA submits that there is no duty of care owed to an individual proponent who seeks to compromise his tax debt to the CRA.

[21] Furthermore, if the Court was to find a proximate relationship and a duty of care owed to the debtor by the creditor, the Defendant CRA submits that it would run contrary to the scheme for proposals set out in the Act by adding a duty of care that was not mandated by Parliament when it enacted the proposal provisions.

[22] The Plaintiff acknowledges that according to the Act once a creditor rejects a proposal the debtor is deemed assignment into bankruptcy. Accordingly, the Plaintiff has sought an order that this deemed assignment be stayed until this action is determined. The Plaintiff claims that an assignment into bankruptcy would be prejudicial to both the interests of the Plaintiff and the public.

Analysis

Motion to Strike by the Defendant Superintendent

[23] Rule 221(1) of the *Federal Court Rules*, SOR/98-106 (the *Rules*) is situated in Part 4 which governs actions. It states:

> 221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> (a) discloses no reasonable cause of action or defence, as the case may be,
>
> . . .
>
> (f) is otherwise an abuse of the process of the Court,
>
> and may order the action be dismissed or judgment entered accordingly.

[24] Under Rule 2 pleading "means a document in a proceeding in which a claim is initiated, defined, defended or answered." Accordingly, a Statement of Claim may be struck when it discloses no reasonable cause of action or when it is an abuse of process.

[25] In *Odhavji Estate v. Woodhouse*, 2003 SCC 69, Justice Iacobucci stated at paragraph 15, that the test for striking out a claim was: the facts are taken as pleaded, then, it must be determined whether it is "plain and obvious" that the action must fail. He stated: "It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment."

[26] A statement of claim that pleads a cause of action that is beyond the court's jurisdiction is an abuse of its process. *Weider v. Beco Industries Ltd.*, [1976] 2 F.C. 739, at paragraph 4.

[27] The Federal Court is a statutory court without inherent jurisdiction. Its jurisdiction is derived from either the *Federal Courts Act* or another federal statute. Section 17(1) of the *Federal*

Courts Act provides that the Federal Court has concurrent original jurisdiction in all cases where relief is claimed against the Crown. However, section 17(6) limits that jurisdiction. It reads:

> 17(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers the jurisdiction on that court. (underlining added)

The general provisions of the *Federal Courts Act* cannot confer jurisdiction where the federal legislation confers jurisdiction on a provincial court unless expressly empowered under that particular legislation.

[28] The *Bankruptcy and Insolvency Act* is a federal statute enacted by Parliament as a complete code for bankruptcy and insolvency matters: *Kalau v. Dahl*, [1985] A.J. No. 572, at paragraph 9. Section 183(a) of the Act confers jurisdiction in bankruptcy matters to the Ontario Superior Court of Justice. That section states:

> 183(1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers (underlining added):
>
> (a) in the Province of Ontario, the Superior Court of Justice;

[29] The sole jurisdictional exception carved out for the Federal Court is that of judicial review of a decision of the Superintendent made in respect of a disciplinary hearing into the conduct of a trustee. Section 14.02 (5) states:

> A decision of the Superintendent given pursuant to subsection (4) is deemed to be a decision of a federal board, commission or other tribunal that may be reviewed and set aside pursuant to the *Federal Courts Act*. (underlining added)

[30] I conclude that the legislation is clear that the Federal Court is without jurisdiction to consider the Plaintiff's request for orders concerning the Act provisions because that jurisdiction rests with the Ontario Superior Court of Justice.

[31] There are other difficulties with the Plaintiff's action in respect of the bankruptcy aspect of his claim.

[32] The Plaintiff names the Superintendent and the Trustee so that they will have notice of these proceedings and in order that they will be bound by a decision of this Court. However, section 215 of the Act explicitly provides that no action lies against the Superintendent or the trustee without leave of the court that has jurisdiction in bankruptcy matters: the Ontario Superior Court of Justice.

[33] The Act, being a complete code dealing with bankruptcy and insolvency, has provisions addressing the very issues the Plaintiff is raising in this action. A court may not rely on its inherent power to make an order negating the unambiguous expression of Parliament's will in a legislative enactment. *Baxter Student Housing Ltd. V. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, at page 243. The Plaintiff must look to the Act to resolve his issues.

[34] The Act provides for two alternative routes for seeking relief:

(a) if a party had concerns regarding the propriety of a vote cast by a creditor that results in a deemed assignment, the party may bring the concerns to the official receiver for adjudication as per section 51(3) of the Act; or

(b) if the party believes the assignment into bankruptcy should not have been made, they can apply to the Ontario Superior Court of Justice, for an annulment of the bankruptcy under section 181(1) of the Act.

[35] The Plaintiff has not followed either course of action available to him. By not doing so, I find the Plaintiff has not availed himself of the remedies under the Act.

Motion to Strike by the Defendant CRA

[36] The Plaintiff alleges that the CRA's failure to accept his Proposal or to negotiate in good faith to amend the terms of the Proposal is unlawful, and contrary to the terms of its duties as a public official and a violation of public policy. The formulation suggests an allegation in the tort of public misfeasance, also known as "abuse of public office". The Plaintiff must then show that the CRA: engaged in deliberate and unlawful conduct; knew that its actions were unlawful; and knew that the actions would likely harm the Plaintiff. *Odhavji* at paragraph 23.

[37] The Plaintiff has not identified any unlawful or deliberate conduct of the CRA other than the rejection of the recommended Proposal without explanation. The Act provides the procedure by which a creditor may respond to or reject a proposal; the CRA followed this procedure. The Act does not require the CRA to provide an explanation for its decision. Without more, the action by the CRA was lawful when considered in the context of the Act.

[38] The Plaintiff also resorted to the language that arises in the tort of negligence. For negligence, he must show that the CRA: owed him a duty of care; breached the standard of care by

its actions; foresaw the harm its actions would lead to; and caused the Plaintiff to suffer injury or damages.

[39] Under the Act, the CRA stands in the same position as any creditor. It is entitled to evaluate the Proposal as any debtor would. It is not under any legal duty to accept less than the debt that it is owed. If anything, the CRA has an obligation to the Government of Canada to collect on income tax and goods and services taxes owed to the government. The CRA, as a debtor, does not owe a duty to the Plaintiff.

[40] The Plaintiff contends that in voting against his Proposal, the CRA acted "in a high-handed, arbitrary and capricious manner … in a reckless disregard for the interests of reasonableness and the lawful exercise of its discretion". In his submissions he states:

> "It is also well-established law that a public authority exercising a judicial or quasi-judicial or decision-making power has a mandatory obligation to furnish the interested person with written reasons for its decision."

[41] It is clear the Plaintiff is focussed on the CRA's decision as the source of the harm that he alleges. The Plaintiff's choice of proceeding prompts me to consider the Federal Court of Appeal decision in *Grenier v. Canada*, 2005 FCA 348.

[42] In *Grenier*, Justice Létourneau, at paragraph 20, held that a litigant who disputes a federal agency's decision was not free to choose between an action and judicial review. A decision made by a federal agency retains its legal force and authority and is judicially operative as long as it has

not been invalidated. The Federal Court of Appeal decided that it was necessary that a decision of a federal agency be first attacked by way of judicial review before bringing an action in damages.

[43] The Plaintiff has brought an action in damages by which he seeks to challenge the decision of the CRA not to accept his Proposal in the bankruptcy proceeding. He has chosen an impermissible course of action. However, I express no opinion whether a decision by the CRA in relation to a proposal under the Act may be challenged by way of judicial review instead of by the processes provided for in the legislation.

Motion for an Interim Stay by the Plaintiff

[44] The Plaintiff seeks a stay of section 57(a) of the Act deeming the Plaintiff into bankruptcy. The Plaintiff does not identify any factual basis, statutory provision or legal authority for a court to stay the operation of section 57(a) of the Act.

[45] It has been decided that the Act does not give authority for a court to stay the operation of a receiving order or an assignment on either an interim or permanent basis. *Kalau* at paragraph 11. In my view, the same is true for deemed assignments into bankruptcy pursuant to section 57(a) of the Act.

Conclusion

[46] I find that it is plain and obvious that the Statement of Claim discloses no reasonable cause of action for the following reasons:

(a) the Federal Court does not have jurisdiction to deal with this action pursuant to section 183(1) of the Act;

(b) the Plaintiff did not obtain leave of the Superior Court of Ontario to bring the action against the Superintendent and the Trustee;

(c) the Plaintiff did not follow the procedure set out by Parliament in the Act to deal with his dispute arising out of the rejection of his Proposal by the CRA;

(d) the Plaintiff failed to allege material facts that would sustain his claim for damages in tort;

(e) the Plaintiff did not proceed in the manner mandated by the Federal Court of Appeal in *Grenier*, namely, first conducting an application for judicial review before commencing an action for damages.

[47] Therefore, I conclude that the Statement of Claim must be struck. I further conclude that the Plaintiff's application for an interim stay of section 57(a) is also to be dismissed.

Costs

[48] Since all three motions were heard at one hearing and the issues overlapped, the order for costs will be awarded in respect of a single motion.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Statement of Claim is struck out.

2. The Plaintiff's application for a stay of the operation of section 57(a) of the *Bankruptcy and Insolvency Act* is dismissed.

3. The Defendants Superintendent and the Defendant CRA are awarded costs in their respective motions.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Stephen Anthony Edell	FOR PLAINTIFF
Liz Tinker	FOR THE DEFENDANT, THE SUPERINTENDENT OF BANKRUPTCY
Kevin Dias	FOR THE DEFENDANT, HMQ (CRA)

SOLICITORS OF RECORD:

STEPHEN ANTHONY EDELL TORONTO, ONTARIO	SELF-REPRESENTED PLAINTIFF
JOHN H. SIMS, QC TORONTO, ONTARIO	FOR DEFENDANTS