COURT OF APPEAL FOR ONTARIO

CITATION: 1732427 Ontario Inc. v. 1787930 Ontario Inc., 2019 ONCA 947
DATE: 20191203
DOCKET: C66803, C66871

Rouleau, Roberts and Harvison Young JJ.A.

In the Matter of Notices of Intention to make a proposal of 1732427 Ontario Inc. and 1787930 Ontario Inc. both of the City of St. Thomas, in the Province of Ontario

Sherry Kettle, for the appellant, Transit Petroleum Inc.

Paul Neil Feldman and Oscar Strawczynski, for the respondent, 1787930 Ontario Inc.

Heard: November 15, 2019

On appeal from the order of Justice Russell M. Raikes of the Superior Court of Justice, dated January 28, 2019, with reasons reported at 2019 ONSC 716, and 2019 ONSC 1623.

REASONS FOR DECISION

[1] The appellant appeals from the motion judge's order requiring it to pay to the respondent the sum of $35,299.75, plus pre-judgment interest, and costs in the sum of $31,767.52.

[2] The motion judge allowed in part the respondent's motion to recover monies paid to the appellant after it had filed a notice of intention to file a proposal in bankruptcy ("NOI") on July 2, 2018. The motion judge found that the pre-authorized debit payment in the amount of $83,734.05 ("the PAD") made to the appellant post-NOI, under a payment plan concluded pre-NOI, related to pre-NOI debts. As a result, contrary to s. 69(1)(a) of the *Bankruptcy and Insolvency*

Act, R.S.C. 1985, c. B-3 ("*BIA*"), the PAD represented a prohibited "remedy against the insolvent person or the insolvent person's property". The motion judge concluded that the appellant should return the PAD to the respondent, net of the $48,434.30 owing to the appellant for post-NOI fuel purchases. The appellant's entitlement to the latter is not disputed on appeal.

[3] The appellant submits that the motion judge erred in characterizing the payment as the prohibited exercise of a creditor's remedy when it represented a *bona fide* agreement concluded on July 5, 2018 to satisfy past debts in order to continue a vital fuel supply to assist in the respondent's restructuring.

[4] The respondent argues that the motion judge correctly determined that the July 5th PAD was a prohibited self-help creditor's remedy because it was payment for past fuel purchases. Moreover, once he determined that the PAD was a prohibited remedy, the motion judge was not required to consider any alleged agreements because the parties could not ratify what was otherwise prohibited. In any event, the respondent maintains that the appellant did not raise an alleged July 5th agreement before the motion judge but confined its argument to the impact of a pre-NOI agreement.

[5] In our view, the motion judge erred by failing to consider whether the parties had entered into a legitimate agreement to pay past debts in order to

secure the future supply of fuel. As a result, the matter should be remitted to him for a new hearing.

[6] In determining whether the July 5th PAD was a remedy, the motion judge was required to consider all the relevant surrounding circumstances in which it occurred. Accordingly, it is useful to set out a brief synopsis of the relevant context leading up to and concerning the July 5th PAD and the alleged agreement between the parties.

[7] Up until July 11, 2018, the appellant supplied fuel to the respondent, a trucking company. The respondent was experiencing serious financial difficulties and had fallen into arrears in payments to the appellant for fuel supplied. In June 2018, the parties entered into negotiations to conclude an agreement governing payment of past and future fuel purchases.

[8] While the motion judge declined to determine whether the parties had reached an agreement prior to the filing of the NOI on July 2nd, the appellant submits that pursuant to the agreement that it says was reached on June 28th, on notice to and without objection from the respondent, it submitted the PAD for payment on July 3rd, which was processed and paid to the appellant on July 5th.

[9] The appellant did not learn of the NOI until its meeting with the respondent on July 5, 2018. As noted at para. 21 of the motion judge's reasons, at that meeting, the respondent's owner, Louise Vonk, accompanied by its general

manager, Blaine Skirtschak, informed the appellant's representatives, Monique Paul and Trevor Chambers, that the respondent "had filed a NOI on July 2, 2018 to restrict further action by CRA and to give [the respondent] some time to reorganize financially to carry on business".

[10] In para. 22 of his reasons, the motion judge summarized the appellant's evidence concerning the respondent's representations which the appellant says formed the July 5th agreement between the parties:

> During the July 5 meeting, Vonk indicated that [the respondent] needed [the appellant's] support to keep operating and she was willing to do whatever was necessary to keep [the appellant] as its fuel supplier. She did not request return of the monies received by [the appellant] from the July 5 PAD. According to Paul and Chambers, Vonk advised that she allowed the PAD to go through because Transit was a 'vital vendor' necessary for [the respondent] to remain in business.

[11] The appellant insists that the issue of a July 5th agreement was raised before the motion judge. Paragraph 30 of the motion judge's reasons provide some support for the appellant's submission that it had advanced the argument that it was a key supplier who, subsequent to the NOI, was permitted to keep the July 5 PAD for past debts in furtherance of an agreement to maintain supply to the respondent as it restructured its business. Similarly, the appellant points to para. 31 of the affidavit of Trevor Chambers in which he deposes that:

> Transit specifically relied on the representations of [the respondent], including Louise, Blaine and Nathan, that all purchases would be paid for by [the respondent] and

> that the Agreed Payment had been allowed to go through so that [the respondent] could continue in business. Transit continued to supply fuel to [the respondent] post-NOI at [the respondent's] request and continued to do business with [the respondent] in good faith and based on [the respondent's] representations.

[12] To be fair to the motion judge, it is not entirely clear to what extent in argument on the motion the appellant characterized the July 5th exchanges as constituting an agreement. However, it seems common ground that the motion judge did not squarely consider whether, in context, that exchange represented a *bona fide* agreement with a key supplier to pay past debts in order to secure a vital future supply of fuel for the respondent's continued operations.

[13] We do not agree with the respondent's submissions that the parties could not enter into an agreement for the payment of past debts in order to secure future fuel supplies. This would undermine the first stage of the *BIA* process that serves to encourage a debtor's successful reorganization as a going concern. Creditors and debtors alike benefit from the latter's continued operation. The goal of the stay and preference provisions under ss. 69, 95, 96 and 97 of the *BIA* is to give the debtor some breathing room to reorganize. Legitimate agreements with key suppliers also form a vital part of that process.

[14] Apposite is the commentary of E. Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 C.B.R. (5th) 161 who writes:

> There is, however, no specific prohibition in the *BIA* on the debtor effecting payment of claims provable in the

> proposal proceedings. Instead, the BIA provides the trustee in the proposal (or the bankruptcy trustee in the event the proposal fails) with remedies against any creditor who receives such a payment on the basis that the payment is a preference. Payments to critical suppliers in the context of proposal proceedings are best analyzed on the basis that they are a preference. … In the context of proposals, section 97 [of the BIA][1] arguably clarifies that payments to suppliers made in good faith after the date the proposal proceedings are commenced (even payments of pre-filing claims) are intended to be valid. [Emphasis added.]

[15] It is our view whether the parties concluded a *bona fide* agreement on July 5th for the payment of past fuel supplies in consideration for continued fuel supply was a key issue to be determined on the respondent's motion. The determination of the issue of the July 5th PAD and alleged agreement could affect the motion judge's characterization of the PAD as a prohibited remedy under s. 69(1) of the *BIA*. As the motion judge made no factual findings respecting this issue, it is not possible nor desirable for this court to come to any determination. Given our reasons, the fairest route, as the parties agree, is to remit the matter to the motion judge for a new hearing.

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[1] Section 97(1) of the *BIA* provides as follows: No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:
(a) a payment by the bankruptcy to any of the bankrupt's creditors;
(b) a payment or delivery to the bankrupt;
(c) a transfer by the bankrupt for adequate valuable consideration; and
(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

[16] We leave to the motion judge's discretion how best to manage the re-adjudication of this matter. With respect to the pre-NOI agreement, the motion judge concluded that, if he were inclined to do so, conflicts in the evidentiary record precluded him from making any findings concerning that agreement and he would order that the issue proceed to trial. It may be that is the case in relation to the alleged July 5th agreement. It will be up to the motion judge to decide whether he can make the necessary findings on the motion or whether the resolution of all these issues requires a trial.

[17] Accordingly, we set aside the motion judge's order and remit the matter to the motion judge for a new hearing on all issues except for the appellant's entitlement to the payment of $48,434.30 for post-NOI fuel purchases.

[18] The appellant is entitled to its partial indemnity costs of the appeal in the agreed upon amount of $15,000, inclusive of disbursements and applicable taxes. The disposition of the costs of the motion below is reserved to the motion judge.

"Paul Rouleau J.A."

"L.B. Roberts J.A."

"A. Harvison Young J.A."