

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Daniel Jovkovic

AND:

Carmen DaSilva and Silverio Manuel DaSilva

BEFORE: Justice A. K. Mitchell

COUNSEL: J. Clark, for the applicant

B. Carter, for the respondent

HEARD: April 13, 2022 via video conference

ENDORSEMENT

Overview

- [1] The respondent, Silverio Manuel DaSilva (“Manuel”), is a bankrupt. The applicant, Daniel Jovkovic (“Jovkovic”), is a creditor of Manuel. The respondent, Carmen DaSilva (“Carmen”), is the spouse of Manuel.
- [2] On June 4, 2021, Jovkovic obtained an order pursuant to s. 38 of the *Bankruptcy and Insolvency Act*¹ authorizing him to bring this application. As required by s. 38(2), the trustee assigned and transferred to Jovkovic all of the trustee’s rights under s. 96(1) of the *BIA* to set aside the transfer (defined below).
- [3] In addition to Jovkovic, all other creditors of Manuel were given the opportunity to join in these proceedings. In exchange for contributing *pro rata* towards the costs of the proceedings, any participating creditor is entitled to share ratably in any recovery (after payment of legal fees). Once the claims of the participating creditors are paid in full, any excess funds will be paid to the trustee for distribution to the remaining (non-participating) creditors.
- [4] The participating creditors are:
- (a) Jovkovic with a proven claim of \$427,659.31;

¹ R.S.C. 1985, c. B-3 (the “*BIA*”), s. 2.

- (b) Dino Salicciolo (“Salicciolo”) with a proven claim of \$210,796.40;
- (c) William Zinger (“Zinger”) with a proven claim of \$314,357.81; and
- (d) Barry Cullen Chevrolet Cadillac Ltd. (“BCCC”) with a proven claim of \$21,581.71.

[5] In these proceedings, Jovkovic, seeks a declaration that (i) the transfer by Manuel of his half-interest in the property municipally described as 87 Light Drive, Cambridge, Ontario (the “property”) to Carmen (the “transfer”), was a “transfer for undervalue” as that term is defined in the *BIA*; and (ii) the transfer is void thereby making the value of his interest in the property available for distribution among his creditors.

Timeline

- [6] The relevant dates and events for purposes of determining the issues on this application are not disputed. The timeline of material events is as follows:
- 1985 – the respondents married.
 - November 2004 – the respondents purchased the property.
 - March 12, 2015 – Jovkovic issued a notice of action, naming Manuel and his corporation as defendants and claiming damages in the amount of \$600,000 (the “Jovkovic action”).
 - June 5, 2015 – Manuel served his statement of defence in the Jovkovic action.
 - October 14, 2015 – Zinger provided Manuel with \$52,844.45 to perform restoration and customization work on Zinger’s vehicle.
 - December 2015 – Salicciolo paid Manuel \$140,000 to restore his vehicle.
 - June 2016 – Manuel terminated the retainer with his lawyer hired to defend the Jovkovic action.
 - June 10, 2016 – Manuel transferred his half-interest in the property to Carmen.
 - July 9, 2016 – Manuel charged Zinger’s credit card the sum of \$261,513.36.
 - May 2017 – Zinger repossessed his vehicle.
 - July 25, 2017 – BCCC issued a statement of claim against Manuel and obtained default judgment in the amount of \$21,504.32.

- August 2017 – Carmen refinanced the property and a mortgage in the face amount of \$550,000 was registered against title to the property
- August 17, 2017 – Zinger issued a statement of claim against Manuel claiming damages of \$314,357.81.
- October 21, 2017 – Salcicciolo issued a statement of claim against Manuel claiming damages of \$265,000.
- November 10, 2017 – Manuel made an assignment in bankruptcy.
- January 14, 2019 – Jovkovic obtained default judgment against Manuel in the amount of \$427,659.31.

The Law

[7] Section 96(1) of the *BIA* provides:

s. 96. (1) on application by the trustee, a court may declare that a transfer at undervalue is void as against the trustee – or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor – if

...

(b) the party was not dealing at arm’s length with the debtor and

...

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph one begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Analysis

[8] The effect of having obtained an order under s. 38 of the *BIA*, is that the applicant “stands in shoes of the trustee” and has all rights under the *BIA* which the trustee enjoyed prior to the assignment.

- [9] Determining whether the transfer is void requires a determination of the following issues:
- (i) whether the transfer was a “transfer at undervalue”;
 - (ii) whether at the time of the transfer Manuel and Carmen were dealing at arm’s length;
 - (iii) whether the transfer occurred during the period that begins on the day that is five years before the date of bankruptcy;
 - (iv) whether at the time of the transfer:
 - (a) Manuel was insolvent at the time of the transfer or was rendered insolvent by it; or
 - (b) Manuel intended to defraud, defeat or delay any one or more of his creditors.

Was the transfer a “transfer at undervalue”?

- [10] In making the application under s. 96(1), the trustee shall state what, in the trustee’s opinion, was the fair market value of the property or services and what, in the trustee’s opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.²
- [11] The parties agree with the applicant’s valuation of the fair market value of the property at the time of transfer of \$380,000. The applicant values the consideration paid by Carmen for the transfer of Manuel’s interest in the property at nil.
- [12] Pursuant to s. 2 of the *BIA*, a “transfer at undervalue” means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.
- [13] The respondents submit that Manuel’s one-half share of the property was, at all times, being held in trust for Carmen. The respondents say that when the property was acquired in 2004 it was always their intention that Carmen, alone, would hold title to the property based on her significant contributions toward the purchase price. The respondents submit their intention on June 10, 2016 was simply to correct title to reflect their original intentions and specifically Carmen’s true beneficial interest in the property as they were experiencing marital issues.

² Section. 96(2), *BIA*.

- [14] I note that Manuel did not file evidence to support the respondents' position on this application. Carmen did not file documentary evidence to support the amount she claims to have paid to acquire the property which she argues justifies her exclusive ownership in the property.
- [15] Based on the respective incomes of the respondents during the 12 year period prior to the transfer I find Manuel and Carmen contributed equally towards the costs and expenses relating to the property. Therefore, I am persuaded that the legal title reflects the beneficial interests held by the respondents. Accordingly, I find that on June 10, 2016 Manuel held a one-half interest in the property having a value of \$190,000.
- [16] The respondents submit that fair consideration was paid for Manuel's half interest in the property when the property was refinanced in August 2017 and the proceeds of refinancing used to pay Manuel's debts. Whether future consideration was paid by Carmen to Manuel does not assist in assessing whether the transfer was a transfer at undervalue. The time for determining the amount paid as consideration for Manuel's share of the property is the date of the transfer – not 14 months after the transfer.
- [17] Although I found a lack of evidence to support Carmen's claim that she held 100 % beneficial interest in the property, Carmen is not foreclosed from advancing a trust claim against the property. It is the role of the trustee to allow or disallow any trust claim Carmen might assert with respect to the property in accordance with the provisions of the *BIA*.

Were Manuel and Carmen dealing at arm's length at the time of the transfer?

- [18] For the purposes of s. 96(1), persons married to one another are "related persons" and, therefore, are deemed not to deal at arm's length.³
- [19] As spouses of one another, I find that at the time of the transfer Manuel and Carmen were related and, therefore, were not dealing at arm's length.

Did the transfer occur during the period that begins on the day that is five years before the date of bankruptcy?

- [20] The transfer occurred on June 10, 2016 which is within the 5-year period preceding Manuel's bankruptcy on November 10, 2017.

Was Manuel insolvent at the time of the transfer or rendered insolvent by the transfer?

- [21] Under s. 2 of the *BIA*, an "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada and whose liabilities to creditors provable as claims amount to \$1000 and,

³ See ss. 4(2) and (5), *BIA*, for the definition of "related persons" and the presumption for purposes of paragraph 96(1)(b).

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of his property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

- [1] On June 10, 2016, Manuel was personally indebted to Jovkovic and was in the midst of a lawsuit. Ultimately, Jovkovic obtained judgment on his claim (which claim arose prior to the transfer) for an amount far exceeding the value of Manuel's interest in the property. There is no evidence that on the date of the transfer Manuel had assets sufficient to satisfy the amounts then due to Jovkovic and forming the basis of the Jovkovic action. Aside from his one-half interest in the property, there is no evidence of Manuel having other assets available to his creditors, including Jovkovic, to satisfy their claims.
- [2] The respondents point to Manuel's shareholding in the corporation as evidence of other valuable assets he owned on the date of the transfer. There is no evidence of the value of Manuel's business, in the form of financial statements, which Manuel operated through the corporation. However, the evidence suggests that the business was struggling financially as both Zinger and Salicciolo were demanding return of their vehicles and deposits paid for restoration work. After the transfer, both Zinger and Salicciolo commenced legal proceedings to recover amounts owed to them in respect of these debts arising prior to the transfer.
- [3] I find that the effect of the transfer was to divest Manuel of his most valuable (and quite likely only) asset available to satisfy the claims of his creditors, including the amounts owing to Jovkovic, thereby rendering him insolvent.
- [4] Last, immediately prior to the date of the transfer, Manuel terminated his lawyer's retainer in connection with the Jovkovic action. This conduct suggests Manuel was unable to continue to fund the ongoing costs of the litigation and therefore was unable to satisfy his obligations generally as they became due. This finding is further supported by the evidence that less than a month after the transfer Manuel charged, without authorization, in excess of \$200,000 on a credit card provided to him by Zinger.
- [5] For the foregoing reasons, I find that the transfer meets the preconditions for the relief sought on this application and I hereby declare the transfer void under s. 96(1) of the *BIA*.
- [6] Since finding that Manuel was insolvent on the date of the transfer, it is unnecessary to determine whether he intended to defraud, defeat or delay any one or more of his creditors. However, I find that Manuel's conduct on or about the date of the transfer is indicative of such an intention.

Disposition

- [7] The application is granted. Order to issue as follows:
1. the transfer of the property from Manuel to Carmen on June 10, 2016 is hereby declared a “transfer at undervalue”; and
 2. the transfer of the property from Manuel to Carmen on June 10, 2016 is hereby declared void as against the trustee and is hereby set aside.

Costs

- [8] The applicant is presumptively entitled to his costs of the application. If the parties cannot agree, written submissions on costs shall be filed as follows:
- (a) the applicant shall serve and file his submissions, not exceeding 5 pages in length (exclusive of caselaw, time docketts and any bill of costs), within 15 days;
 - (b) the respondents shall serve and file their submissions, not exceeding 5 pages in length (exclusive of caselaw, time docketts and any bill of costs), within 15 days thereafter; and
 - (c) the applicant shall serve and file any reply submissions, not exceeding 2 pages in length, within 5 days thereafter.



Justice A.K. Mitchell

Released: May 27, 2022