

Facts

- [4] On April 13, 2018, Mr. Little made an Assignment in Bankruptcy under the BIA. BDO Dunwoody Canada Limited (“BDO”) was appointed as the Trustee in Bankruptcy.
- [5] Mr. Little’s sworn Statement of Affairs in his bankruptcy claimed assets totaling \$436,504.00, comprised of his residence in Bracebridge (claimed value of \$430,000.00) and furniture, personal effects, investments, and “other” valued in total at \$6,504.00. The estimated value of the gym equipment is stated as \$1.00.
- [6] On September 10, 2020, while an undischarged bankrupt, Mr. Little started this lawsuit against his former landlord Bramcan Investments Limited (“Bramcan”) and two of Bramcan’s officers and directors, Catherine Spencer (“Spencer”) and Geoffrey Crawford (“Crawford”). In this lawsuit, Mr. Little claims the value of assets disposed of by the Defendants.
- [7] Mr. Little alleges that he leased a retail unit in a building owned by the Defendants for his fitness and strength building business “Nautilus North”. He operated the business as a sole proprietorship. The business name was not registered.
- [8] On November 4, 2018, the property was damaged by a fire in the neighbouring unit, and Mr. Little could not operate his business. Shortly after the fire, the Landlords advised him that he could keep his property - industrial gym equipment and personal possessions - in the unit while it was being renovated. He alleges that he was never asked to remove his property from the unit, nor was he notified that his property would be distrained if not removed.
- [9] In the fall of 2019, the Plaintiff alleges that he learned through another tenant that the Defendants had disposed of all of his industrial gym equipment and personal possessions without any advance warning. The personal possessions were identified as “memorabilia” comprised of the Plaintiff’s Bruce Lee and Mike Mentzer collections (handwritten material, articles, photos and autographs).
- [10] The Plaintiff’s Statement of Claim alleges that the value of these assets was approximately \$250,000.00.
- [11] Thus, even if Mr. Little was mistaken about the value of the property when he swore his Statement of Affairs in April 2018, he knew that these assets had substantial value by September 2020. This information was never communicated to the trustee in bankruptcy.
- [12] Mr. Little was not discharged from bankruptcy until October 21, 2021, more than one year after the Statement of Claim was issued.
- [13] Mr. Little did not disclose the bankruptcy in his Statement of Claim or in his Affidavit of Documents.

- [14] Mr. Little did not disclose in his bankruptcy application the property valued at \$250,000 in this Statement of Claim.
- [15] On August 29, 2023, Mr. Little brought a motion for summary judgment in this action. In his affidavit filed in support of the motion for summary judgment, Mr. Little now estimates that the personal property in the unit (Nautilus machines, office equipment, valuable collector's items, research documents, personal library, and client records) was worth approximately \$430,000. None of these items were included in Mr. Little's Statement of Affairs filed in his bankruptcy application.
- [16] Mr. Little has proposed to amend his Statement of Claim to reflect these higher estimates.
- [17] The Defendants discovered the bankruptcy when conducting a cross-examination of Mr. Little in August 2023, and brought this motion to dismiss the claim under Rule 21.01(3)(b).

Analysis

- [18] Rule 21.01(3)(b) provides:

21.01(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

- [19] The Defendants argue that when Mr. Little made his assignment into bankruptcy on April 13, 2018, he ceased having any capacity to commence an action for conversion or bailment for property which vested in the trustee in bankruptcy.

Scheme of the *Bankruptcy and Insolvency Act*

- [20] Under s. 49(1) of the BIA, an insolvent person “may make an assignment of all the insolvent person's property for the general benefit of the insolvent person's creditors”.
- [21] The assignment must be accompanied by a sworn statement “showing the debtor's property that is divisible among his creditors” (s. 49(2)). A bankrupt has the duty to make “discovery of and deliver all his property that is under his possession or control to the trustee” (s. 158(a)).
- [22] The term “property” is broadly defined in s. 2 of the BIA:

property means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; [Emphasis added.]

- [23] “Things in action” includes tort and contract claims in relation to property. It does not include a claim for personal injury: *Meisels v. Lawyers Professional Indemnity Company*, 2015 ONCA 406, at para. 13:

Certain exceptions to s. 71 have been carved out by the jurisprudence. One of the exceptions is where the claim or loss is personal in nature rather than proprietary, such as where the damages claimed are to be estimated by reference to injury to the bankrupt's person, i.e., for pain and suffering or mental distress or reputational damage. In such cases, the cause of action does not become the property of the trustee in bankruptcy and may be pursued by the bankrupt in his or her own right. [Citations omitted.]

- [24] Pursuant to s. 71 of the BIA, with the filing of an assignment in bankruptcy, all “property” of the bankrupt vests in the Trustee in Bankruptcy and the bankrupt has no “capacity” to deal with his/her “property”. An action commenced by an undischarged bankrupt (other than a personal action) is a nullity: *Meisels* at para. 12; *Murphy v. Stefaniak*, 2007 ONCA 819, at para. 28; *Treats International Franchise Corporation v. 2247383 Ontario Inc.*, 2015 ONSC 7399, at paras. 10 – 12.

- [25] Section 71 of the BIA states:

On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment...

- [26] Pursuant to s. 30(1)(d), the trustee may:

bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt.

- [27] Causes of action that otherwise would belong to a bankrupt person generally fall within the definition of property that vests in the trustee in bankruptcy for that person, pursuant to ss. 2 and 71 of the BIA: *Watt v. Beallor Beallor Burns Inc.*, 2004 CanLII 18877 (ON SC), at para. 2: affirmed (2004), 2004 CanLII 19821 (ON CA), 1 C.B.R. (5th) 149 (Ont. C.A.).

- [28] In *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, the Supreme Court of Canada delineated the effect of s. 71:

The clear wording of the statute indicates that, upon assignment into bankruptcy, the bankrupt relinquishes his ability to deal with both existing and after-acquired property, all of which vests in the trustee in bankruptcy. As property has been defined under the Act to include things in action, it appears that an undischarged bankrupt has no capacity to maintain an action for breach of contract.

[29] Section 67 of the BIA exempts certain property from the operation of the BIA. Section 67(1)(b) exempts:

b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

[30] The applicable law in Ontario is the *Execution Act*, RSO 1990, c E.24 Section 2 of that act exempts from forced seizure:

1. Necessary clothing of the debtor and the debtor's dependants.
2. Household furnishings and appliances that are of a value not exceeding the prescribed amount.
3. Tools and other personal property of the debtor, not exceeding the prescribed amount in value, that are used by the debtor to earn income from the debtor's occupation.
4. One motor vehicle that is of a value not exceeding the prescribed amount.
5. Personal property prescribed by the regulations that is of a value not exceeding the prescribed amount.

[31] Ontario Regulation 657/05 under the *Execution Act* sets the prescribed exempt amount for "tools and other personal property of the debtor" at \$14,405. Accordingly, s. 67 of the BIA does not apply to the Plaintiff's action.

Analysis

[32] Mr. Little made the assignment in bankruptcy on April 13, 2018. Since the property that was stored at the Defendants' building was worth more than \$14,405, Mr. Little had a legal obligation to disclose the existence of this property to the trustee in bankruptcy, and, whether or not disclosed, the property – including any claim for loss or damage to the property - vested in the trustee in bankruptcy to be sold for the benefit of the creditors.

[33] When Mr. Little commenced the action against the Defendants on September 10, 2020, he was still an undischarged bankrupt, and therefore the action is a nullity. Only the trustee in bankruptcy had the capacity to commence the action: *Meisels* at para. 12; *Murphy*, at para. 28.

Indeed, Thompson and several other cases stand for the proposition that an action commenced by an undischarged bankrupt is a nullity: see e.g. *Long v. Brisson* (1992), 1992 ABCA 184 (CanLII), 3 Alta. L.R.(3d) 79 (C.A.); *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3

S.C.R. 701 at para. 58; *McNamara v. Pagecorp Inc.* (1989), 38 C.P.C.(2d) 117 (Ont. C.A.).

- [34] “An undischarged bankrupt should, of course, wait until he or she obtains an order of absolute discharge before commencing proceedings and failure to do so will ordinarily be fatal”: *Murphy*, at para. 31; *Vetro v. Canadian National Exhibition Association*, 2014 ONSC 4324, at para. 46(ii).
- [35] Since the action was a nullity when commenced by Mr. Little on September 10, 2020, he would have to recommence the action after he was discharged from bankruptcy on October 21, 2021.
- [36] Putting aside for the moment the question of whether Mr. Little would be liable for violating the provisions of the BIA for failing to disclose such valuable property to the trustees in bankruptcy in 2018, Mr. Little has now missed the limitation period for commencing the action against the Defendants. By his own admission, Mr. Little learned that his property had been disposed of by the Defendants in the fall of 2019, so the limitation period expired two years later in the fall of 2021: *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B, s. 4. Since the September 10, 2020 action is a nullity, it cannot now be recommenced.
- [37] The Plaintiff argues that the action is not a nullity, but only a misnomer. He acknowledges that the action should have been brought in the name of the trustee in bankruptcy, and acknowledges that he made a mistake by bringing it in his own name. He argues that this misnomer can and should be cured under Rule 5.04(2) of the Rules of Civil Procedure, which provides:
- 5.04 (2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
- [38] The Plaintiff asks that the style of cause be amended, effective upon the issuance of the statement of claim, by substituting the trustee’s name for his name, as the plaintiff. He did not bring a formal motion for this relief, but raised it for the first time in his oral argument.
- [39] The Defendants argue that since the claim was a nullity, the identity of the plaintiff is not simply a misnomer that can be corrected.
- [40] In support of their position, the Defendants rely on the Ontario Court of Appeal’s decision in *Douglas v. Stan Fergusson Fuels Ltd.*, 2018 ONCA 192, a case that involved the intersection of bankruptcy law and the doctrine of subrogation. It considered whether an insurer was entitled to commence a subrogated claim in the name of its bankrupt insured. The Court concluded that, since, at the time the action was commenced, the insured’s cause of action had vested in his trustee in bankruptcy and the insured was an undischarged bankrupt, the insured lacked capacity to bring the action, and the insurer could not

commence a subrogated claim in his name. The subrogated action commenced by the insurer was therefore dismissed.

[41] The Court considered whether it could or should regularize the insurer's subrogated action by substituting the name of the trustee in bankruptcy for that of the insured in the style of cause under r. 5.04(2) of the Rules of Civil Procedure.

[42] The Court of Appeal declined to make this order. The primary reason for declining this order was the fact that the insurer had failed to seek this relief at the original hearing, and was raising this for the first time on appeal. The Court did, however, comment on the merits of this proposal, stating, at para. 125:

3. The "irregularity" that State Farm seeks to correct was intentional. State Farm chose to commence its subrogated action in Mr. Douglas's name, knowing that Mr. Douglas had filed an assignment in bankruptcy, and continues to assert that it was entitled to do so.

...

4. Even if this court were to grant such relief, the pleadings would be deficient and unable to support an ongoing action by the Trustee without further amendments. The statement of claim does not plead that Mr. Douglas's interest in the property or his cause of action vested in the Trustee. Instead, it pleads that Mr. Douglas was an owner of the property at all material times.

[43] Similar concerns arise in this case. Naming Mr. Little as the plaintiff was not merely a formal irregularity. Mr. Little had a duty to disclose this property to the trustee in bankruptcy and he failed to do so. Nor did he reference the bankruptcy in his Statement of Claim. In that respect, this case is very similar to *D'Alimonte v. Porretta*, 2011 ONCA 307, where the Court of Appeal concluded (at paras. 19 - 20) that even if the action was not a nullity from the outset, the plaintiff's failure to disclose to the trustee in bankruptcy a substantial asset that was the subject of the lawsuit disentitled her to relief under the BIA.

[44] Moreover, it is my view that Rule 5.04(2) does not apply in this case. The trustee in bankruptcy is a distinct party from Mr. Little, not just a different name for the same party. The trustee in bankruptcy has already been discharged and did not participate in these proceedings. The trustee in bankruptcy has not requested to be named as the plaintiff in this action, and no motion was brought by the Plaintiff under Rule 5.04(2) to substitute the trustee in bankruptcy for Mr. Little as the Plaintiff.

[45] The Plaintiff relies on the Court of Appeal's decision in *Murphy*, where an order was made *nunc pro tunc* regularizing the commencement of proceedings to overcome what the Court found to be an administrative formality. The bankrupt had disclosed his alleged interest to the trustee. The trustee had investigated it and decided not to pursue its realization. His solicitor had assured the bankrupt that his personal right to pursue the claim would not be prejudiced by this decision of the trustee, and the bankrupt was found to have had a

reasonable expectation that the claim would be returned to him after the bankruptcy. The Court of Appeal in *Murphy* recognized that an action commenced by an undischarged bankrupt was a nullity due to lack of legal capacity to sue in his own name. For this reason, the Court declined to convey to the bankrupt the interest in the lawsuit *nunc pro tunc* to its commencement date. Rather, the Court found that the bankrupt had fulfilled all of the conditions for a discharge before he commenced the action, but that the absolute discharge was not granted before that date due to (at para. 30):

[A]dministrative delay and backlog in the bankruptcy court office. The order had been prepared, indicating that the Registrar was satisfied that the conditions for the absolute discharge had been met, and all that remained was for the order to be “stamped and issued”. In good faith, Murphy had commenced the application having “every reason to believe” that he had been discharged from bankruptcy.

- [46] Accordingly, the Court changed the date of the discharge order to post-date the issuance of the claim “in the unusual circumstances of the present case”.
- [47] No such circumstances exist in this case.
- [48] The case at bar is more similar to *D’Alimonte* than to *Murphy*. The value of the property was not disclosed to the trustee in bankruptcy when Mr. Little made an Assignment in Bankruptcy on April 13, 2018, nor when the Statement of Claim was issued on September 10, 2020, nor at any time prior to Mr. Little’s discharge from bankruptcy on October 21, 2021. He did not disclose to the trustee in bankruptcy the existence of this action, nor advise that the cause of action was or could be an asset of the estate. See *Clement v. A.G. of Canada and Mark Gallant*, 2012 ONSC 5823, at para. 30.
- [49] I am of the view that the action was a nullity when commenced, and cannot be saved under Rule 5.04(2).
- [50] In the alternative, given the Plaintiff’s failure to disclose these assets to the trustee in bankruptcy, this is not an appropriate case in which to exercise any discretion I may have to substitute the trustee in bankruptcy for the Mr. Little as the plaintiff, particularly in a case in which the trustee in bankruptcy had no notice that such relief was being requested.

Conclusion

- [51] For the foregoing reasons, the Defendants’ motion under Rule 21.01(3)(b) to have the action dismissed on the ground that the Plaintiff is without legal capacity to commence the action is granted.
- [52] Costs of this motion fixed at \$7,500, all in, payable by the Plaintiff to the Defendants in 30 days.

Justice R.E. Charney

Released: March 11, 2024

CITATION: Little v. Bramcan Investments Limited, 2024 ONSC 1485

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOHN LITTLE o/a NAUTILUS NORTH STRENGTH
AND FITNESS CENTRE

Plaintiff

– and –

BRAMCAN INVESTMENTS LIMITED,
CATHERINE SPENCER and GEOFFREY
CRAWFORD

Defendants

REASONS FOR DECISION

Justice R.E. Charney

Released: March 11, 2024