COURT OF APPEAL FOR ONTARIO

DATE: 20210319
DOCKET: M52081 (C68797)

Coroza J.A. (Motion Judge)

In the Matter of the Bankruptcy of Guo Li Chun

James Gage, Christopher Hubbard, Trevor Courtis and Akiva Stern, for the moving parties

John N. Birch and Ben Goodis, for the responding party, Guo Li Chun

Ashley John Taylor, Lee Nicholson and Ben Muller, for the responding party, KSV Restructuring

Heard: January 29, 2021 by video conference

REASONS FOR DECISION

I. Overview

[1] The moving parties in this motion are a syndicate of six banks (the "Lenders"). The responding party is the appellant, Guo Li Chun. On October 29, 2020, Conway J. found that the appellant owed the Lenders over $300 million and has assets of $7 million in Ontario, and she granted a bankruptcy order against her under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

Conway J. also appointed a trustee over the appellant's estate. On November 12, 2020 the appellant filed a notice of appeal. Pursuant to s. 195 of the BIA, upon the commencement of an appeal, the bankruptcy order is automatically stayed pending appeal. The pertinent text of s. 195 reads:

> **195** … all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

[2] The Lenders seek a partial lift of the stay that would reinstate the powers of the trustee to the extent necessary to permit the trustee to identify and preserve the appellant's assets pending appeal. They assert that the appellant is frustrating the bankruptcy process and will dissipate her assets.

[3] I would grant the Lenders' application. Maintaining the status quo prejudices the Lenders because the trustee has been prohibited in carrying out its duties to identify and preserve the appellant's assets as a result of the filing of an appeal that appears to have little merit. It is in the interests of justice to lift the stay in respect of ss. 158(b), (c), (d), (f), (g), (o) and 163(1) and 164(1) of the BIA.

II. Background Facts

[4] For the purposes of this decision, it is only necessary to provide a brief review of the facts.

[5] The Lenders entered into an agreement dated September 10, 2019 to provide over $500 million USD in loan financing to Haode Investment Inc. (“Haode”).

[6] The appellant and her husband guaranteed the obligations of Haode. Haode is beneficially owned by the appellant, her husband and their family. The security for the loan included the pledge of shares of a coffee franchise, which are also beneficially owned by the appellant, her husband and their family.

[7] On April 2, 2020, the value of the coffee franchise shares, including those pledged as security for the loans, plummeted. Haode failed to repay the loans, and a guarantee demand was sent to the appellant and her husband demanding immediate repayment. The Lenders then commenced an application before Conway J. for a bankruptcy order.

[8] Conway J. found that the evidence was sufficient to establish the factual foundation for the bankruptcy order (i.e. that the loan was advanced to Haode; a demand for repayment was made; the guarantee demand was sent to the appellant; and she has not paid under the guarantee). Conway J. rejected the appellant’s objections to the Lenders’ affidavit evidence. She found that the affiants had sufficient knowledge since they were properly connected with the commercial funding transaction in question. Conway J. did not accept that evidence had to be adduced from the very person involved in wire transferring funds to Haode or

emailing Haode and the appellant. While s. 43(3) of the BIA requires personal knowledge of the material facts supporting the application for a bankruptcy order, that requirement has been interpreted broadly.

[9] Conway J. also found the guarantee was binding – since the appellant is a beneficiary of the ultimate shareholder of Haode, she indirectly received a benefit from the loan advanced to Haode. Conway J. found the test for a bankruptcy order was met because the Lenders established they are creditors of the appellant, and she is a debtor as an insolvent person – her assets are $7 million and her liabilities under the guarantee are over $300 million.

[10] Conway J. also declined to exercise her residual discretion to refuse to grant the bankruptcy order, as the appellant did not provide any compelling reason for doing so. Conway J. granted the bankruptcy order and appointed a trustee over the appellant's estate.

III. Discussion

[11] This motion raises one issue. Should this court partially lift the automatic stay under s. 195 of the BIA to ensure the appellant's assets are identified and protected pending the appeal?

[12] In considering whether the automatic stay should be cancelled, the court will principally consider two factors: (1) the merits of the appeal and (2) the relative prejudice to the parties: *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185, 78

C.B.R. (6th) 165, at para. 11; *First National Financial GP Corp. v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1, at para. 40; *Yewdale v. Campbell, Saunders Ltd.* (1995), 9 B.C.L.R. (3d) 252 (C.A.), at para. 15.

(i) Merits of the Appeal

[13] The appellant submits that Conway J. relied upon inadmissible hearsay evidence to find that the elements of a bankruptcy had been established. The appellant also argues that Conway J. erred by treating the Lenders as a single creditor, and by not considering certain relevant factors in deciding not to exercise her residual discretion to refuse to grant the bankruptcy order.

[14] I agree with the Lenders that the grounds of appeal advanced by the appellant are extremely tenuous. In my opinion, Conway J. reviewed the test for proving allegations in a bankruptcy proceeding, noted that the "personal knowledge" requirement for affidavits by corporate representatives is to be interpreted broadly, and made careful factual findings on the basis of those affidavits. Further, she noted that some of the facts supporting the bankruptcy order were not contentious and were confirmed by the appellant's own materials.

[15] An appeal generally lacks merit where it consists largely of complaints about factual findings or seeks to re-litigate them. Since the panel hearing the appeal will have to approach Conway J.'s decision with deference in mind, the appellant's

efforts to overturn the decision will be an uphill climb. I will use three examples that fortify my conclusion.

[16] First, the argument that Conway J. erred by concluding the Lenders advanced funds to Haode is puzzling. There is no evidence to the contrary. As Conway J. found, it was conceded by the appellant on the bankruptcy application.

[17] Second, the argument that Conway J. erroneously concluded that the Lenders sent certain notices to the appellant that she was in default appears to be devoid of merit. The Lenders provided evidence that those notices were sent. It was open to Conway J. to rely on an affidavit sworn by the appellant in related proceedings in the British Virgin Islands. In any event, it is unclear that Conway J. actually did rely on the affidavit and the appellant's objection to its admissibility is being raised for the first time on appeal.

[18] Finally, I do not think that the appellant's argument that six banks (i.e. the Lenders) are converted into a single creditor because there is one loan agreement has any merit. As confirmed by Conway J., each lender signed as an individual, and each had a commitment to fund a specific portion of the loan.

[19] Overall, I find that the grounds of appeal advanced by the appellant are extremely weak.

(ii) Prejudice

[20] The appellant submits that if the stay is partially lifted, it will cause her prejudice in terms of inconvenience and impact on her privacy rights. She will have to cooperate with the trustee, make wide disclosure, and submit to intrusive examinations.

[21] The appellant argues that maintaining the stay will not prejudice the Lenders because there is no evidence that her assets have been dissipated or are at risk. To the contrary, before the stay came into effect, the trustee appointed over her estate took steps to safeguard her assets in Canada by registering the bankruptcy order against title to her properties and notifying the appellant's Canadian banks of the bankruptcy order. Furthermore, any suggestion that the Lenders are prejudiced by the stay is undermined by their delay in bringing this motion to partially lift the stay. The stay took effect on November 4, 2020 but the Lenders waited until December 20, 2020 to bring this motion.

[22] In my view, the issue of prejudice favours the Lenders.

[23] On the issue of delay, I accept the Lenders' explanation that they wanted to review the appellant's factum before bringing the motion. Since the merits of the appeal are an important consideration, that was a reasonable move on their part.

[24] I agree with the appellant that the trustee has taken significant steps to identify and preserve assets in Canada and there is no direct evidence that the

appellant will dissipate any of her assets. However, as I see it, the Lenders' claim is also grounded in the appellant frustrating the process of bankruptcy by stonewalling attempts to identify and properly protect her assets in Canada and other jurisdictions. For example, the appellant has not provided any disclosure or information to the trustee regarding any assets, whether within or outside of Canada, held indirectly through corporations or trusts, nor does she deny that such assets exist. The prejudice to the Lenders is the risk that if the trustee is not permitted to continue its investigation of the appellant's assets, there will be a loss of relevant financial information. I note that the appeal is not scheduled to be heard until September of 2021. I agree with the Lenders that the trustee should not be delayed, for several months, in its efforts to look into and preserve any assets which may become the subject of the order.

[25] In contrast, I see very little prejudice to the appellant. It is true that a partial lifting of the stay would require her to immediately make disclosure and potentially submit to investigations about her personal affairs but that is as a result of the bankruptcy order. As a result of the order, the BIA provides powers to the trustee which are not possessed by ordinary, unsecured creditors of the bankrupt, especially when it comes to compelling answers or the production of documents.

[26] I conclude that the status quo of leaving the stay in place is prejudicial to the Lenders and this factor pulls towards partially lifting the stay.

[27] In conclusion, the appellant's grounds of appeal are extremely tenuous and there is prejudice to the Lenders if the stay were to remain in place. A partial lifting of the stay to permit the trustee to properly identify and protect the appellant's assets pending appeal is in the interests of justice.

(iii) Form of Order

[28] The Lenders provided a detailed draft order to this court. The appellant objects to the terms of the proposed order and argues that they include a worldwide *Mareva* injunction in respect of assets she owns or jointly owns with others.

[29] The appellant does not live in this jurisdiction. She has assets in Canada and elsewhere. While I am not persuaded by the appellant's argument that the order is a disguised *Mareva* injunction, I acknowledge some of the wording of the Lenders' proposed order is inconsistent with the provisions of the BIA. For example, the proposed order would require the appellant to submit to examination under oath at the request of the trustee, whereas s. 158(c) of the BIA provides that the examination of the bankrupt is to be called and managed by the official receiver. The proposed order would also require the appellant to provide to the trustee descriptions of all property sold, transferred, disposed of or gifted in the five years prior to June 12, 2020, whereas s. 158(f) excepts certain dispositions of property from the disclosure requirement and s. 158(g) sets out a different disclosure period for property disposed of "at undervalue".

[30] I would simply order that the automatic stay under s. 195 of the BIA should be cancelled to the extent of permitting the trustee to carry out its duties under ss. 158(b), (c), (d), (f), (g), (o) and 163(1) and 164(1) of the BIA. The appellant shall have 15 days to comply with this order.

[31] I highlight for the parties that the specific manner in which the trustee acts pursuant to the powers given under the BIA is within the trustee's discretion. To the extent the powers are exercised in a manner with which the appellant does not agree, directions can be sought from a court pursuant s. 34(1) of the BIA as needed.

IV. Disposition

[32] The Lenders' application is granted. Pending the hearing of the appeal, the stay of proceedings imposed by s. 195 of the BIA is lifted in respect of ss. 158(b), (c), (d), (f), (g), (o) 163(1) and 164(1) of the BIA.

[33] If the parties cannot agree to costs of the motion they may make written submissions. The submissions of the Lenders shall be made within ten days of these reasons. The submission of the appellant shall be made ten days thereafter. The submissions shall not exceed two pages each.

S. Coroza J.A.