2018 CarswellOnt 18520
Ontario Superior Court of Justice

Imlau, Re

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Re Monica Lilli Imlau

Master M. Jean

Judgment: November 5, 2018
Docket: 31-814427

Counsel: M. Harris, for Backrupt
F. Bennett, for Creditor, American Express
J. Rumanek, for Licenced Insolvency Trustee

Subject: Insolvency

***Master M. Jean*:**

1 By endorsement dated March 8, 2018, I granted the bankrupt a discharge from her bankruptcy on the condition that she pay $3,000 and which discharge be suspended for 6 months, with reasons to follow. These are my reasons.

2 The bankrupt's discharge application came before me by way of a motion to vary an earlier refusal of discharge.

3 At the date of the hearing of the motion, the bankrupt was a 67 year old pensioner. She filed an assignment in bankruptcy with Rumanek & Company Ltd. on August 30, 2005. This bankruptcy was her fourth bankruptcy. By reasons dated January 20, 2010, Registrar Nettie refused the bankrupt's application for discharge. In his reasons, Registrar Nettie noted that the bankrupt filed her first assignment at age 29 in 1979 and thereafter has made an assignment in each decade thereafter. Registrar Nettie recognized that the first two bankruptcies were explained by the bankrupt's emerging medical disabilities. However, with her third and fourth bankruptcies, the number of creditors increased and the level of debt increased. Registrar Nettie observed that this fourth bankruptcy occurred 14 years after the bankrupt commenced living solely on a disability pension, 12 years after the bankrupt received a $70,000 lump sum inheritance and 12 years after the bankrupt received a $13,000 lump sum retroactive disability payment.

4 Registrar Nettie concluded that the bankrupt had lived extravagantly and beyond her means, being income of $1,250 net per month. She spent more than her income and relied on food banks for meals. Registrar Nettie said, at paras 9 and 10:

> [9] In short, this fourth time bankrupt is not at all financially rehabilitated, and I find that it would be entirely inappropriate to discharge her from bankruptcy on any terms until she can demonstrate some hope of not coming back to the BIA in her sixties and seventies and beyond. Ordinary Canadians would be offended by the concept of bankruptcy being used a decennial debt relief mechanism, as one slips further and further into extravagance and credit abuse.
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> [10] The Bankrupt has avenues available to balance her budget. She can apply for rent geared to income housing; she can give up her automobile; she can cut back on telephone and internet expenses. Until she has done these things, and regained control of her finances, she has no hope of a financial future on any terms.

5 On the motion to vary, the bankrupt's affidavit filed in support reveals that the bankrupt's income has improved since her last application for discharge, to $1,800 net per month, based on CPP, OAS and GIS, Trillium and GST rebates. The bankrupt's expenses remain high - rent and vehicle expenses total $1,181 of her income or 66%.

6 The bankrupt's discharge from bankruptcy is opposed by the trustee. The trustee seeks discharge on the condition that the bankrupt pay $18,600 being 20% of the proven debts, a ban on unsecured credit for 5 years and a suspension of discharge for 24 months.

7 The bankrupt's discharge is also opposed by a creditor, American Express.

8 I wish to comment briefly on the procedure by which the bankrupt's discharge application comes before the court. Counsel for the bankrupt brought the application by way of a motion to vary the refusal. In my view, this is not properly a motion to vary under s. 172(3) of the BIA. Accordingly, the factors that the court typically considers on such motions (see Re Cowie (1991), 6 CBR(3d) 227 at para. 5, per Farley J. do not apply.

9 In my view, I treat this as an application for discharge which is permitted under s. 187(5) of the BIA, which provides as follows:

> Every court may review, rescind or vary any order by it under its bankruptcy jurisdiction.

10 It has been said that if the court does not fix a time within which an application for discharge may be brought on again, after discharge is refused, the only way of varying such an order of refusal is by way of an application under s. 187(5). See Houlden, Morawetz and Sarra, *The 2017-2018 Annotated Bankruptcy and Insolvency Act* (Thomson Reuters: Toronto, 2017-2018) at p. 980.

11 In my view, it is appropriate to consider the application for discharge de novo and, further, to consider the reasons given for the refusal of discharge on the earlier application and the bankrupt's conduct since that order was made.

12 Counsel for the bankrupt leaves it to the court's discretion to fashion an appropriate disposition on the application for discharge.

13 There is no doubt that that ss. 173(1)(a) and (j) × 4 applies. The bankrupt is not entitled to an absolute discharge and the court is entitled to consider whether terms or conditions and/or suspension are appropriate.

14 This is the fourth bankruptcy. One of the bankruptcies was not disclosed by the bankrupt, as she claimed no recollection of it. A lengthy suspension is appropriate, barring any other factors.

15 Registrar Nettie found that the bankrupt had not rehabilitated. While I have concerns about the bankrupt's current budget, I am satisfied that the bankrupt has taken steps to balance her budget and live more within her means. I was impressed by the bankrupt's ability to know exactly where/how she spends her income. I was also impressed by the bankrupt's savings for her funeral and budgeting for her legal costs.

16 While I am not impressed with the use of the credit card post bankruptcy, it appears that the bankrupt did not knowingly apply for it and, when she received it, she advised PC Financial of her bankruptcy. I note from the credit bureau that the bankrupt has been diligent and timely in her repayment of the balance on the credit card monthly and, in my view, she has been using this credit responsibly. I see this as a factor going towards the bankrupt's rehabilitation.

17 I conclude that the bankrupt be discharged but conditionally. I do not see this as a case for refusal, as submitted by the opposing creditor. In my view, the bankrupt has made significant and successful efforts to rehabilitate and improve her budgeting. The opposing creditor submitted that the bankrupt made no effort to make a payment for the benefit of creditors, but I do not see that the bankrupt had any ability to make any or a significant payment for the benefit of creditors. This is not a case of abuse or fraud, as submitted by the opposing creditor. I am of the view that the bankrupt

has been irresponsible in her financial dealings in the past. She has demonstrated an ability to improve in that regard, in my view.

18 While the bankrupt is of limited means, in my view, there should nonetheless be a payment condition imposed on her discharge. Counsel for the bankrupt submitted that a $2,000 payment be appropriate. In my view, there shall be a $3,000 payment. It seems to me that the bankrupt has acquired a vehicle of that cost (really, an after acquired asset) and that value is appropriately paid to the estate. The bankrupt has demonstrated an ability to save and it seems to me that the estate should receive some benefit.

19 I have imposed a 6 month suspension. In my view, the bankrupt has remained undischarged for 13 years. That is a long time, but nonetheless, a further 6 month suspension is appropriate to reflect the seriousness of this case, being a fourth bankruptcy.

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