

**IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY**

CIV-2009-454-508

IN THE MATTER OF the Insolvency Act 2006
AND IN THE MATTER OF of the bankruptcy of KAREN NASH

BETWEEN BUNNINGS LIMITED TRADING AS
BENCHMARK BUILDING SUPPLIES
Judgment Creditor

AND KAREN LESLEY NASH
Judgment Debtor

Hearing: 4 March 2010

Appearances: D. Sheppard - Counsel for Judgment Creditor
No appearance for the Judgment Debtor

Judgment: 4 March 2010

ORAL JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

Solicitors: Craig Griffin & Lord, Solicitors, PO Box 9049, Newmarket, Auckland

[1] Before the Court is an application by the judgment debtor, Karen Lesley Nash, to set aside a Bankruptcy Notice issued against her by the judgment creditor.

[2] When this matter was initially before the Court on 20 August 2009 the application to set aside the Bankruptcy Notice was set down for hearing at 2.15 pm on 26 November 2009 and 1 or 2 hours were allowed for this hearing. Ms Nash the judgment debtor appeared personally at that call on 20 August 2009.

[3] When the matter was then called on 26 November 2009, Ms Nash again appeared in person and requested an adjournment of that hearing. This was on the basis she said that she had only that day received for the first time a copy of the judgment creditor's Notice of Opposition to her application and its affidavit in support and needed time to consider these.

[4] That 26 November 2009 request for an adjournment was granted. The matter was adjourned to a new hearing today, 4 March 2009 at 2.15 pm. On 26 November 2009, both Mr Sheppard, who appeared as counsel for the plaintiff and Ms. Nash, the judgment debtor confirmed that this adjourned hearing date of 4 March 2010 was acceptable.

[5] When the matter was called at 2.15 pm today, 4 March 2010 Mr Sheppard appeared for the plaintiff but there was no appearance by or for Ms Nash as judgment debtor.

[6] The hearing scheduled over 3 months ago nevertheless proceeded in her absence today based upon all the material before the Court. This included the judgment debtor's application to set-aside the bankruptcy notice filed 3 August 2009, an affidavit in support dated 3 August 2009, a further affidavit by Ms Nash dated 16 September 2009 and affidavits in opposition filed on behalf of the judgment creditor on 1 September 2009,

[7] Turning to consider the application before the Court, the judgment debtor to succeed in this application on the grounds put forward must establish in terms of s 17 Insolvency Act 2006 that she has a counterclaim set-off or cross-demand against the

amount claimed by the judgment creditor that is equal to or greater than the judgment debt and that she could not use such counterclaim set-off or cross demand as a defence in the action or proceeding in which that judgment was obtained against her – *Clark v UDC Finance Limited* [1985] 2 NZLR636 and *Sharma v ANZ Banking Group (NZ) Ltd* (1992) 6 PRNZ 386(CA).

[8] In the present case, the grounds advanced by the judgment debtor in support of her application are described in her application as “I am disputing the bill due to the fact that incorrect/unsuitable materials were supplied including wet timber that caused delays and costs to remedy.”

[9] In her supporting material the judgment debtor appears to contend that material supplied by the judgment creditor was sub-standard in that timber had an excessive moisture content which caused significant extra costs for her in completing a building project.

[10] There was nothing before this Court, however, to indicate that there was any good reason why the judgment debtor could not have set up these matters as a defence or partial defence in the District Court action which resulted in the judgment against her which founds the present bankruptcy application. That judgment issued on 16 February 2009 was for \$58,140.35. Significantly, there has been no application to the District Court by the judgment debtor to set this judgment aside.

[11] Instead, as I understand the position, the judgment debtor has set out in a purported statement of defence entitled in the District Court that some \$10,440.00 was incurred by her plus interest in carrying out remedial building work as a result of the wet timber problem which she had encountered.

[12] Even if that claim was to be ultimately substantiated (and at this stage it is merely an unsubstantiated contention advanced by the judgment debtor alone), this would still leave well in excess of \$40,000.00 outstanding to the judgment creditor under the Bankruptcy Notice.

[13] As general background to the debt in question here, the judgment creditor supplied building materials and hardware goods to the judgment debtor nearly two and a half years ago during the period August 2007 to December 2007 to a value of something in excess of \$40,500.00. The judgment debtor has since made no payments of any kind in reduction of this amount outstanding.

[14] Despite a number of demands and communications made since that time no part of the debt was paid and as I have noted above the District Court gave judgment against the judgment debtor for this amount plus costs and interest on 16 February 2009.

[15] Then, in July 2009 the present Bankruptcy Notice was issued against the judgment debtor, served upon her and the resulting application to set it aside was brought.

[16] The material which the judgment debtor has placed before the Court in an endeavour to substantiate her claim that the debt is disputed is scanty to say the least. There is no independent or expert verification of the claims she makes that the materials supplied were defective.

[17] In addition, as I have noted at paragraph [11] above, in any event, any possible counterclaim the judgment debtor may have against the judgment creditor by her own acknowledgement would amount to something over \$10,440.00 and certainly nowhere near the \$61,776.95 now claimed in the Bankruptcy Notice.

[18] For all these reasons I conclude that there is no admissible evidence before the Court to substantiate as even reasonably arguable the counterclaim which the judgment debtor has endeavoured to advance here. She has not appeared today despite knowing of this hearing date and agreeing to it over 3 months ago on 26 November 2009. Indeed the adjournment on 26 November 2009 of the hearing date to today 4 March 2010 was at her request.

[19] For these reasons the application by the judgment debtor to set aside the Bankruptcy Notice must fail.

[20] An order is now made that the judgment debtor is to have until 5.00 pm on 18 March 2010 to comply with the Bankruptcy Notice served upon her.

[21] The judgment creditor has succeeded in opposing the present application and I see no reason why it is not entitled to an order for costs in the normal way.

[22] Costs are therefore awarded to the judgment creditor on this application on a Category 2B basis together with disbursements as fixed by the Registrar.

‘Associate Judge D.I. Gendall’