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Docket: BK 19-02-01891
(Brandon Centre)
Indexed as: ***Economical Mutual Insurance v. Guilbert***
Cited as: 2020 MBQB 179

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

		Appearances/Counsel
ECONOMICAL MUTUAL INSURANCE COMPANY,	)	
Applicant,	)	MICHAEL FINLAYSON & LAUREN GERGELY
- and -	)	for the Applicant
PATRICK GUILBERT,	)	
Respondent.	)	JAMES BEDDOME
	)	Respondent
	)	
	)	JUDGMENT DELIVERED:
	)	December 9, 2020

MENZIES J.

[1] Guilbert, the respondent bankrupt, was a businessman operating a Home Hardware franchise in Neepawa, Manitoba. He insured his business premises through the applicant, Economical.

[2] On February 25, 2015, the premises were destroyed by fire. Pursuant to the standard mortgage clause in the policy of insurance issued by Economical, the sum of $596,122.00 was paid out to two mortgage holders on the property as well as $45,733.20 for clean-up costs from the fire.

[3] Economical brought an action against Guilbert to recover the monies paid out on the basis that the fire was deliberately set by Guilbert and that he willfully and/or fraudulently misrepresented facts in his proof of loss presented to Economical, including the origin of the fire itself.

[4] The matter proceeded to trial before Kroft J. of this court who issued a decision on March 21, 2019. Kroft granted judgement in favour of Economical in the amount of $1,052,293.71.

[5] In May of 2019, Guilbert made an assignment in bankruptcy.

[6] Economical seeks a declaration that their judgment against Guilbert is a debt that would not be released by an order of discharge in bankruptcy pursuant to the provisions of s. 178 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "*BIA*").

THE BANKRUPTCY AND INSOLVENCY ACT

[7] Economical asks for relief under two provisions of, s. 178(1) of the *BIA*, namely:

> s. 178(1) An order of discharge does not release the bankrupt from
> (a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;
> ...
> (e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;
> ...

I am persuaded that for Economical to succeed in their application, they must bring their application within the ambit of s. 178(1)(e). I am of the opinion that s. 178(1)(a) does not apply. I am in agreement with the oft quoted statement of

Master Funduk in ***Jerrard v. Peacock***, (1985) 37 Alta LR (2d) 197, at para. 42 in which he says, "Paragraph (*a*) is essentially an administration of justice concept. The liabilities caught by it will be in relation to criminal or quasi-criminal matters".

[8] Similarly, in ***Simone v. Daley***, 1999 CanLII 3208 (ON CA), 170 DLR (4th) 215, 43 OR (3d) 511, at para. 29:

> An analysis of the provisions of s. 178(1) shows that the types of debt which survive a bankruptcy may be divided into four overall categories, namely:
>
> (1) those which have been imposed by a court in the form of a fine or some other penalty for an offence against the state (para. (a));
> ...

[9] While the action brought by Economical before Kroft J. was founded in arson and fraud, the action was a civil matter. The nature of the action was not to determine an offence against the state. The manner of proceeding, the onus of proof and the consequences of any findings by the court are not consistent with a criminal or quasi-criminal proceeding. Therefore, I will only be addressing the effect of s. 178(1)(e) in the balance of this decision.

THE JUDGMENT OF KROFT

[10] At paragraph 74 of his decision in ***Guilbert v. Economical Mutual Insurance Company***, 2019 MBQB 48, Kroft J. made the following finding:

> ... Taking all of the evidence into account, which in this case is mostly circumstantial, motive, opportunity, and incendiary cause are established. Economical has proved, on a balance of probabilities, Guilbert started the fire—a clear breach of the plaintiffs' contractual and statutory obligations to Economical summarized in subparagraphs 9(b) and (c) of these reasons.

[11] And at paragraphs 89 and 90 of the decision:

> ... I am satisfied from all the evidence, especially the number of questions posed by Economical about financial matters, Guilbert appreciated Enterprises' financial situation at the time of the fire was highly relevant to Economical (and the police) during their investigations. I am also satisfied Guilbert knew his representations were false or made recklessly, disregarding the truth. Individually and certainly collectively, they were material, in the sense of having the capacity to affect the mind of Economical as it managed Enterprises' claim.
>
> These misrepresentations are further breaches of the plaintiffs' contractual and statutory obligations to Economical summarized in subparagraphs 9(b) and (c) of these reasons.

[12] Economical relies on these findings in their request for a declaration.

CHARACTERIZATION OF THE DEBT

[13] Despite the findings of Kroft J., Guilbert maintains he did not intentionally start the fire nor did he make any false representations to Economical in filing the proof of loss and the subsequent investigation into the cause of the fire. Guilbert points to the evidence before the learned trial Judge which showed the following:

1) the Office of the Fire Commissioner conducted an investigation and was unable to determine the cause of the fire;
2) the RCMP investigated the fire and no criminal charges were pursued against Guilbert;
3) the evidence relied upon by Economical at the trial was largely circumstantial;
4) Guilbert has always maintained he did not start the fire nor did he knowingly or recklessly make any false statements to Economical;

5) Guilbert has always intended to launch an appeal of the decision rendered by Kroft J. but lacks the financial means to do so.

[14] Guilbert asks that the court should conduct a review of the proceedings before Kroft J. with a view to "characterize" the decision.

[15] The principles to be considered in characterizing a judgment were set out by Edmond J. in ***Sharma v. Sandhu***, 2019 MBQB 160, at para. 34:

> The principles applicable to the present application can be summarized as follows:
>
> a) Pursuant to s. 178(2) of the ***BIA***, an order of discharge releases the bankrupt from all claims provable in bankruptcy;
> b) Section 178(1) establishes exceptions to the general rule and the onus is upon the applicant to establish that one of the exceptions applies. ...;
> c) When characterizing a judgment for the purposes of s. 178, a court may look at the pleadings and the circumstances that gave rise to the judgment including facts pleaded in support of the action that led to the judgment debt, any evidence that was presented at the time to obtain judgment and any reasons given for judgment. (See ***H.Y. Louie Co.*** at para. 87 and ***Lawyers' Professional Indemnity Co.*** at para. 6);
> d) Once a creditor obtains judgment, the cause of action arising from its claims is merged in the judgment. The court characterizes the judgment based on the pleadings and proceedings that resulted in the judgment. When they include a claim that property was obtained by false pretences or by fraudulent misrepresentation, the judgment may be characterized as within s. 178. (See ***H.Y. Louie Co.*** at para. 88);
> e) Extraneous evidence is not admissible on an application to declare that a judgment debt falls within s. 178 of the ***BIA***. The ***BIA*** is a federal statute and in the interests of comity and for the sake of consistency, the ***H.Y. Louie Co.*** and ***Lawyers' Professional Indemnity Co.*** decisions should apply across Canada. The approach is a principled one, given that it is the judgment debt that has to be characterized. (See ***Lawyers' Professional Indemnity Co.*** at para. 46);
> ...

[16] Although there is ample authority for the Court to refer to the pleadings and evidence tendered in the proceedings which gave rise to the judgment

against Guilbert, there exists an insurmountable hurdle preventing Guilbert from obtaining the nature of the review he is requesting. Rather than characterizing the judgment issued by Kroft J., Guilbert is asking this court to set aside the fundamental findings set out in his decision of March 21, 2019.

[17] Kroft found that Guilbert had set the fire of February 25, 2015. Further, Kroft J. found that Guibert had intentionally or recklessly made misrepresentations to Economical in the course of submitting a claim pursuant to the policy of insurance. Those issues were at the very heart of the trial before Kroft J. It is not for this court to re-litigate those findings. Economical is entitled to rely on those findings in this application without having to prove their case a second time. Guilbert is bound by those findings. They are res judicata.

SECTION 178(1)(E)

[18] The purpose of the ***BIA*** was discussed by the Ontario Court of Appeal in the decision of ***Simone v. Daley***, supra, at paras. 27 and 28:

> An important purpose of bankruptcy legislation is to encourage the rehabilitation of an honest but unfortunate debtor, and to permit his or her re-integration into society — subject to reasonable conditions — by obtaining a discharge from the continued burden of crushing financial obligations which cannot be met: see Re Newsome (1927), 32 O.W.N 292, 8 C.B.R. 279 (S.C.); Canadian Bankers' Assn. v. Saskatchewan (Attorney General), [1956] S.C.R. 31, 35 C.B.R. 135; Cleve's Sporting Good Ltd. v. J.G. Touchie & Associates Ltd. (1986), 74 N.S.R. (2d) 86, 58 C.B.R. (N.S.) 304 (C.A.); Ironwood Investments Joint Venture v. Leggett Estate (Trustee of) (1996), 38 C.B.R. (3d) 256 (Ont. Gen. Div.) at p. 264; and Jerrard v. Peacock (1985), 57 C.B.R. (N.S.) 54, 37 Alta. L.R. (2d) 197 (Master).
>
> Debts which survive a bankruptcy as a result of the provisions of s. 178(1), therefore, are exceptions to this overriding principle, and should be addressed accordingly.

[19] As was stated in ***Martin v. Martin***, 2005 NBCA 32, [2005] NBJ No 116 (QL), at para. 11:

> ... As mentioned in *Simone*, for example, the types of debt which survive bankruptcy are any debts arising out of fraud, dishonesty, or misconduct while acting in a fiduciary capacity. Parliament has clearly made a policy decision that a bankrupt should not be allowed to raise the shield of his or her general discharge against judgment creditors who hold judgments grounded on such reprehensible conduct. As the court in *Simone* stated, "[t]hose kinds of conduct are unacceptable to society and a bankrupt will not be rewarded for such conduct by a release of liability."

[20] Guilbert argues that in order for Economical to succeed, Economical must prove all essential averments of fraudulent misrepresentation as set out in ***Peek v. Derry***, (1889) LR 14 App Cas 337, [1889] UKHL 1, namely:

1) the making of a representation;
2) the representation was false;
3) the representation was made knowingly; without belief in its trust, or recklessly indifferent whether it was true or false; and
4) the creditor relied on the representation and turned over property to the debtor.

[21] Essential averments 1, 2, and 3 are all clearly set out in the decision of Kroft. J. The crux of Guilbert's argument rests on the assertion that Economical did not rely on the false representations found by Kroft J. in making payment to the mortgage holders. Guilbert argues Economical paid out the insurance proceeds as it was required to do by the standard mortgage clause.

[22] I reject that argument. It is true that Economical was bound to make payment to the mortgage holders by virtue of the standard mortgage clause

contained in the policy of insurance. That obligation arose as a result of the loss or fire of February 25, 2015. However, the obligation to pay arose out of a contractual obligation between Guilbert and Economical in which Guilbert was obliged not to intentionally commit any act which would trigger the operation of the standard mortgage clause. Guilbert did so when he intentionally lit the fire. He then compounded that tortious act when he submitted the proof of loss denying responsibility for the loss, which Kroft J. found was a knowingly false statement.

[23] In ***Erie Mutual Fire Insurance Co. v. Konert***, [1988] I.L.R. 1-2360, [1988] O.J. No. 1375, 11 A.C.W.S. (3d) 297, the Ontario Divisional Court held:

> 7 I disagree with the finding ... that the fraudulent misrepresentation in the proof of loss should be treated separately from the arson. I also reject the argument before us that to be within s. 148(1)(*e*) of the Act the fraud must have been present at the time that the policy was issued. Fraud can occur at any time prior to the bankruptcy.
>
> 8 If the defendants had no mortgage on their property and the insurer had paid the $15,000 directly to the defendants, the combination of the arson and the fraudulent misrepresentation in the proof of loss would clearly bring the matter within s. 148(1)(*e*) of the Act. The fact that the payment was made to the mortgagee should not make any difference. ...
>
> ...
>
> 10 The act of arson and the fraudulent filing of the proof of loss had nothing to do with the mortgagee. The mortgage clause merely directed to whom the $15,000 was to be paid. It did not relieve the defendants from their obligation under s. 148(1)(*e*). To interpret s.148(1)(*e*) more narrowly would encourage persons to act fraudulently in cases such as this with impunity.

[24] I would also like to refer to the comments of the Alberta Court of Appeal in interpreting s. 178(1)(e) of the *BIA* in ***McAteer v. Billes***, 2006 ABCA 312, [2006] A.J. No. 1333 (at para. 6):

> The central question is whether the interpretation of s. 178(1)(e) (formerly s. 148(1)(e)) by the Court in ***Morgan*** is patently unsound. Section 178(1)(e) is poorly worded, and has been interpreted both conjunctively and disjunctively. If read disjunctively, property is not required to pass in the case of fraudulent misrepresentation. If read conjunctively, the opposite conclusion flows. The Court in ***Morgan*** stated at 246:
>
> > We read that disjunctively: it speaks of "liability for obtaining money by false pretenses" or "liability for ... fraudulent misrepresentation". Liability for the fact of fraudulent misrepresentation can exist without any benefit flowing to the tortfeasor, and we see no reason why liability should be limited to cases where property is obtained, and not apply to those cases where damages were suffered by the victim but nothing obtained by the tortfeasor.

[25] It is inconceivable to me that s. 178(1)(e) would oblige a debtor to make good on his debt in the circumstances in which no mortgage clause was in existence, but release a debtor from his debts due to the existence of a mortgage clause in the policy of insurance. Such a result would fly in the face of the policy underlying the enactment of s. 178.

CONCLUSION

[26] I am satisfied Economical has established that the judgment of Kroft J. issued on March 21, 2019, is a debt within the ambit of s. 178(1)(e) of the *BIA* and as a result, Guilbert is not released from this debt by a discharge in bankruptcy.

[27] The issue of costs on this matter were not addressed by the parties. If the parties cannot agree on that issue, I would be prepared to hear their submissions upon request.

J.