

Can an undischarged bankrupt start a lawsuit without notifying his trustee in bankruptcy? (Little v. Bramcan Investments Ltd.)

Bankruptcy and Insolvency Act | Insolvency | Litigation | Litigation & Dispute Resolution | Rules of Civil Procedure | Transportation and Logistics

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Can an undischarged bankrupt bring a lawsuit in his own name without notifying his trustee in bankruptcy? In *Little v. Bramcan Investments Ltd.*, 2024 ONSC 1485 (CanLII), the Ontario Superior Court of Justice answered this question “no”, finding that a plaintiff who commences an action when they are an undischarged bankrupt lacks the capacity to commence litigation. Only a trustee in bankruptcy has the capacity to commence an action for an undischarged bankrupt. Therefore, the action in this matter was a nullity.

The plaintiff’s action arose out of the alleged wrongful disposal of personal property located in a commercial unit the plaintiff leased for use as a fitness center from the defendant, Bramcan Investments Ltd. (“**Bramcan**”). The plaintiff’s business was unincorporated.

On 4 November 2018, a fire caused damage to the unit, rendering it unusable. However, Bramcan, unaware that the plaintiff had made an assignment in bankruptcy seven months earlier and was an undischarged bankrupt, advised the plaintiff that he could leave his property, which included industrial gym equipment and personal possessions, in the unit while renovations and repairs took place.

Although the plaintiff claimed in his action that the value of the gym equipment and personal possessions was \$250,000, at the time that the plaintiff made his assignment in bankruptcy, he swore a Statement of Affairs in which he claimed a residence worth \$430,000, and personal assets, comprised of furniture, personal effects, investments and other items, worth \$6,504. The plaintiff also claimed that gym equipment he owned was worth only \$1.

In the fall of 2019, the plaintiff alleged that he learned from another tenant of Bramcan that the defendants had disposed of all of his industrial gym equipment and personal possessions that were in the unit. The plaintiff identified the personal possessions as “memorabilia”, comprised of his Bruce Lee and Mike Mentzer collections.

Notwithstanding that a trustee in bankruptcy had been appointed in connection with his assignment in bankruptcy, the plaintiff sued the defendants in his own name.

The defendants brought a motion under rule 21.01(3)(b) of the *Rules of Civil Procedure* (the “**Rules**”) to dismiss the action because under the *Bankruptcy and Insolvency Act* (the “**BIA**”), the plaintiff had lost control over his property and capacity to sue.

Under section 71 of the BIA, when a person files an assignment in bankruptcy, all of their “property” vests in the trustee in bankruptcy and the person no longer has “capacity” to deal with their property. “Property” is broadly defined under the BIA as including “things in action”. “Things in action” include tort and contract claims.

As well, under section 30(1)(d) of the BIA, only the trustee has the power to bring, institute or defend any action or legal proceeding relating to the property of the bankrupt.

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While the plaintiff argued that his action was not a nullity and only a misnomer such that the trustee in bankruptcy could be named as the plaintiff in substitution of his name, the plaintiff also acknowledged that the action should have been in the name of the trustee at the outset and that he made a mistake by bringing it in his own name.

Under [rule 5.04\(2\)](#) of the [Rules](#), a court, at any stage of a proceeding, can add, delete or substitute a party or correct the name of a party incorrectly named, unless prejudice would result that could not be compensated by costs or an adjournment.

However, the defendants contended, relying on [Douglas v. Stan Fergusson Fuels Ltd.](#), 2018 ONCA 192, that where a claim is a nullity because it has been brought by an undischarged bankrupt, the identity of the plaintiff cannot be a misnomer which can simply be corrected by substituting the name of the trustee in bankruptcy for the plaintiff.

The motion judge agreed with defendants, finding that [rule 5.04\(2\)](#) did not apply because the plaintiff was a distinct party from his trustee, not just a different name for the same party. The motion judge also noted that the trustee in bankruptcy had already been discharged and had not participated in the proceedings. The trustee in bankruptcy made no request to be named as a plaintiff in the action and the plaintiff failed to bring a motion under [rule 5.04\(2\)](#) to substitute the trustee in bankruptcy for him.

The motion judge also expressed concerns that the plaintiff had breached his duty to disclose property to the trustee in bankruptcy and failed to reference the bankruptcy in his pleading. Accordingly, the motion judge concluded that the plaintiff's case was similar to [D'Alimonte v. Porretta](#), 2011 ONCA 307, wherein the Court of Appeal for Ontario found that even if an action was not a nullity from the outset, a plaintiff's failure to disclose to the trustee in bankruptcy a substantial asset which was subject to a lawsuit disentitled relief under the [BIA](#).

Lastly, the motion judge noted that since the plaintiff had commenced his action when it was a nullity, but was now a discharged bankrupt, even if he could bring a new claim, it would be statute-barred.

This decision serves as a reminder that lawyers should always ensure that the proper party is commencing a lawsuit. An action commenced in the wrong name may not be curable under [rule 5.04\(2\)](#) of the [Rules](#). In the context of a bankruptcy, an action brought by an undischarged bankrupt will generally be fatal because of the provisions found in the [BIA](#) and the duties imposed on a person who makes an assignment in bankrupt to disclose all of their property and assets, which vest in the trustee in bankruptcy. It is unwise for a person who files an assignment in bankruptcy to conceal property from disclosure in their Statement of Affairs. A PDF version is available for download [here](#).

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