

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
))
CHARLES MACINTYRE,) *Darcy R. Merkur, Counsel for the*
) **Applicant**) **Applicant**
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-))
- **and –**))
))
HER MAJESTY THE QUEEN, in right) *Lori E. J. Patyk, Counsel for the*
of the Province of Ontario as represented) **Respondent**
by the Ministry of Community and Social))
Services, Respondent))
) **Heard: September 23, 2003**
GREER J.

REASONS FOR JUDGMENT

[1] Charles MacIntyre (“the Applicant”) was struck by a car on May 4, 1996, while he was a pedestrian crossing the street in front of a car. The driver of the car was Susan Bloomfield, his common-law spouse (“Bloomfield”), who had stopped to let the Applicant out of the car. Since Bloomfield was without insurance, the Motor Vehicle Accident Claim Fund (“MVACF”) defended the Action. The Action was resolved and by Judgment of Mr. Justice Wright dated September 24, 2001 (“the Judgment”), and personal injury damages were awarded to the Applicant in the amount of \$36,250. The Applicant’s party and party Costs of \$10,700 and his assessable disbursements of \$5,458.43 were also paid by the Crown on behalf of MVACF. Her Majesty the Queen in right of Ontario as represented by the Ministry of Community and Social Services (“the Respondent” or the “Ministry”), seized the sum of \$30,984 from the proceeds of the Judgment pursuant to the provisions of the *Financial Administration Act*, R.S.O 1990, c.F.12, as amended (“the Act”).

[2] It is the position of the Applicant that the proceeds were seized pursuant to a Writ of Seizure and Sale obtained by the Ministry dated April 23, 2001, and were not taken pursuant to the Act.

[3] The Respondent brought on an Application pursuant to Section 725 of the *Criminal Code of Canada*, for an Order that the “Accused Charles MacIntyre”, pay to the Ministry, an amount by way of satisfaction or compensation for loss suffered by the Ministry, as a result of the commission by Charles MacIntyre of the offence of fraud over. The Honourable Judge Wheting granted such Order on April 6, 2001, ordering the Applicant to pay to the Ministry, the sum of

\$30,984 for his fraud. The Ministry then obtained the Writ of Seizure and Sale dated April 23, 2001, for the amount in question.

[4] The Applicant moves for a Declaration that Judgment paid by MVACF was for the payment of personal injury damages to the Applicant and is therefore not subject to seizure by the Respondent. He asks for an Order requiring the immediate repayment to the Applicant by the Respondent of the proceeds so received by it. The Applicant further asks for pre-judgment interest on the amount so taken and for his Costs on a substantial indemnity basis.

The Issue

[5] The issue before me is whether personal injury compensation for damages can be seized by a creditor such as the Ministry, in the circumstances of this case. Is this a case where such damages should receive special treatment and be exempt from seizure as they are in bankruptcy matters? Does the Act entitle the Ministry to make such a seizure when the monies were, at law, due from Bloomfield but payable by the Crown pursuant to the provisions of the MVACF?

Analysis

[6] By letter of July 4, 2002 to counsel for the Applicant, the counsel for the Ministry wrote and said the following:

The Ministry received the funds pursuant to an outstanding Writ of Seizure and Sale, issued April 6, 2001. The Restitution Order resulted from the conviction of your client for defrauding the Social Assistance Program.

[7] Counsel for the Applicant was then asked by the Ministry to sign a Release with respect to his legal fees and disbursements, which he did on August 23, 2002. Paragraph 2 of that Release reads:

2. The MVACF paid \$30,984 to the Crown in satisfaction of a Writ of Seizure and Sale in favour of the Ministry of Community and Social Services (MCFCS) pursuant to subsection 43(2) of the *Financial Administration Act*. The balance of the funds, being \$21,424.43 was paid by MVACF to the solicitor for Charles MacIntyre, David R. Tenzen;

[8] The Respondent now takes the position, says the Applicant, that the funds were not seized pursuant to the Writ but were set off against the restitution Order pursuant to subsection 43(2) of the Act.

[9] The Applicant's position is that personal injury damages so awarded are not subject to seizure by the Respondent, since they are compensation for the pain and suffering of the Applicant caused by the accident. The Applicant analogizes his situation to that under the *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3 ("the BIA"), where a bankrupt's "real or

personal property” is available to be distributed among his or her creditors. S.67 of the BIA, however, exempts certain property from being taken by the bankrupt’s Trustee. It includes property that may be acquired by or devolve on the bankrupt before his discharge. This includes damages for personal injury where a Judgment has not yet crystallized. In the bankruptcy decision, *Re Hollister*, [1926] 3 D.L.R. 707 (O.S.C.), the Court held at p.708:

The law is well settled that the Bankruptcy Act never intended to increase the assets of an insolvent for division amongst his creditors, by monies recovered in an action for personal injuries, as these monies are awarded as damages to the debtor for his pain, suffering and loss of comfort of life...

See also: *Matsos v. Jankura* [1972] O.J. No.636 (H.C.J.)

[10] In addition, the BIA provides that the property of a bankrupt does not comprise any property that is exempt from execution or seizure under the laws of the province where the bankrupt resides. These exemptions include such things as necessities of life and tools of the trade and such.

[11] The Ministry claims that it has a right of set-off under the FAA to retain the monies owing to the Applicant since they are payable by the Crown. The Crown, by definition under the FAA, includes any agency of the Crown. S.43(2)(a) of the FAA reads:

- (2) Where in the opinion of the Treasurer a person is indebted to the Crown in right of Ontario or in right of Canada in any specific sum of money, the Treasurer may,
 - (a) retain by way of deduction or set-off, out of any money that is due and payable by the Crown in right of Ontario to such person, such sum as the Treasurer sees fit in the circumstances

[12] It is the Ministry’s position that it did just that, and it had the right to do so, given that the payment to the Applicant came from the MVACF, and thereby from the Crown. The Applicant says that at law the monies came from the Defendant Bloomfield. The Applicant also argues that the Ministry cannot now raise the issue of set-off, as the matter is *res judicata*. The Ministry is claiming set-off in law, as it is set out in the statute, as opposed to equitable set-off. It has been held, however, in *National Bank of Canada v. Saskatchewan Property Management Corp.* [1993] S.J. 345, Q.B.M. No.299 of 1993 J.C.R. (Sask Q.B.) in para. 11 that whether set-off is claimed in law or in equity, the claimant must be a party who owes a debt and who is owed a debt, both involving the same party.

[13] It is the position of the Ministry that there was no prior agreement by it not to set off the funds. It says that the Writ of Seizure and Sale really quantifies the amount owing, as does the Court Order. The Release signed by the Applicant’s counsel states that the funds are being set off in accordance with the FAA. It further says that COMSOC took no steps to enforce the Writ

of Seizure and Sale and there is nothing in the *Execution Act*, supra, that says that damages for personal injury are exempt.

[14] The Ministry notes that in *Matsos*, supra, the court points out in para. 5, that it has been held in *Lefebvre v. Montreal Tramways Co.*, 29 C.B.R. 55, [1948] Que. S.C.105, that if personal injury damages had been liquidated by judgment before bankruptcy, the amounts allowed for hospital and medical expenses, spectacles, and the loss or earnings during temporary disability would be exempt from seizure, but not the amount allowed for pain and suffering. It should also be noted, that under the BIA, the bankruptcy does not wipe out monies owing by the bankrupt for fines. In the case before me, the Applicant owed the money to the Ministry as a result of a restitution Order, given that he had been found to have defrauded COMSOC.

[15] The Ministry argues that given that the Applicant is not a bankrupt, I should not say that damages for personal injury are exempt in other circumstances. It is clear that the funds which are paid out by the MVACF, it has become a party to the Action. While it does not step into the shoes of Bloomfield as a party, MVACF is the payor in place of Bloomfield and becomes a party in its own right. The funds come via the Crown from the Consolidated Fund of the government, and therefore, it has a right to claim over against Bloomfield to recover what it paid on her behalf.

[16] MVACF, in my view, has a statutory right to recover the money so paid by it to the Applicant, through the Crown's right of set-off under the provisions of the Act. In *Holt v. Telford*, [1987] 2 S.C.R. 193, [1987] S.C.J. No.53, File No.: 19175, the Supreme Court of Canada addresses, in para. 25(Q.L.), the meaning of "mutual debts". There, the Court quotes from *Royal Trust V. Holden* (1915), 22 D.L.R. 660 (B.C.C.A.) at pp.662-23 as follows:

...we are relieved to find that "mutual debts" mean practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading—per Kennedy, L.J., in *Bennet v. White*, [1910] 2 K.B. at 648, 79 L.J.K.B. 1133.

[17] Further, in para.33, the Court outlines the principles to be applied respecting set-off. They note that the claim and the cross-claim need not arise out of the same contract. This is the case before me. There is no doubt that both the damages money and that, which gave rise to the Restitution Order, comes from the same purse, that of the Consolidated Fund of the Crown. Given this, it would be manifestly unjust to allow the Applicant to keep the damages money when he had committed fraud and obtained funds through COMSOC.

[18] In *Mintzer v. Canada*, [1995] 131 D.L.R. (4th) 746, Court File No. A-68-95 (QL) (F.C.A.), the Court found that the Canada Pension Plan operates in a similar way to the Act, in that it allows the Minister to retain, by way of deduction or set-off, amounts that may be or become payable to a person by Her Majesty. Therefore, in the case before me, the Minister acted properly in setting off the amount owing to it from the proceeds being paid to the Applicant from the MVACF.

[19] Finally, in *Canadian Airlines Corp. (Re)* [2001] A.J. No. 226, 2001 ABQB 146, Action No. 0001-05071. In paragraphs 39 and 40 thereof, the Court notes that the cross-obligations between the parties arise out of the same relationship between the parties. It further notes that the funds flow in and out of the same source, being the coffers of the B.C. Government as taxing authority. This is similar to the case before me.

Conclusion

[20] The Application is therefore dismissed. The Ministry acted within its statutory right to set off, under the Act, the monies owed to it by the Applicant from the funds set to be paid to him by MVACF. Order to go accordingly.

[21] Given the fact that there were no cases on point, and the somewhat uniqueness of the fact situation before me, I make no Order as to Costs.

GREER J.

Released: October 7, 2003

Court File No: 03-CV-252741CM3

Date: 20031007

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