SUPERIOR C0URT OF JUSTICE ONTARIO
(In Bankruptcy and Insolvency)

RE: In the matter of the bankruptcy of Fox Health Group Inc.;

BEFORE: MASTER C. WIEBE

COUNSEL: And-rew Ostrum fot Charles Koehler and Career Dynamics Network Inc., together the "Creditors" (the moving parties);
Harold Rosenberg for Alan Walton, [CL]Walton" (the tcspo

HEARD: December 16, 2014 at Toronto, OntaHo,

REASONS FOR DECISION ototion fot examination)

Introduction

ll.] The Creditors seek an order under section 163(2) of the Bankruptcy and Insolvent) Act. R S C .19859 c,B-3 as amended (the [4]<BL4") authorizing the Creditors to examine Walton both in his personal capacity and as director and office of 2052005 Ontario Inc. operating as Fox Psychological Services ("FPS'), The Creditors dso seek production of books, documents, correspondence and papers in the power and possession of Walton and FPS concerning rhe subject bankruptcy, Thc bankrupt is a company related to FPS, namely Fox Health Group Inc, ([C]'.FHG'D.

[2]For the reasons stated herein, I grant the motion.

Background

[3) The following facts ate not disputed. On July 2012 the Creditocs obtained consent judgment against FAG in the amount of $200,000. Walton was the sole dixector and officef of FHG and is the sole officer and director of FPS.

[4] Walton did not attend on four examinations m aid of execution. of these were arranged with Walton's consent. Walton did noc attend on the fourth occasion (the examination scheduled for June 12, 2013), despite his earlier consent, because of a complaint he made about the Creditors' lawyer, a complainc he later withdrew on August 13, 2013. On August 7, 2013, Justice

Chinppetta ordered that Walton attend on an examination on September 9, 2013

[5) On September 6, 201 m FHG filed as assignment in ban-kn..tpccy. Despite the automatic stay, Walton consented to procccd with his examination by the Creditors on November 2013, as otdeted by Justice Chiappetta.

[6] At his examination, Walton stated that FHG and FPS operated ouc of the same premises, that they both provided psychological services, chat FHG provided other sctvices as well, that FPS started operating after FHG ceased operating, that FHG had $180,818 in accounts tcceivable as of August 31, that FHG[9]s accouats receivable deeiined to $60,021.16 as of April 1 6, 2()13, that this decline in accounts receivable was due to the receipt of payments and wåte-offs none of which were corroborated by documents, that FHG's bank account was closed on May 31, 2012* chat Walton was the only recipient of management fees ftom FHG, &iat these fees more than doubled between 2009 and 2010, and that FHG did not prepare financial statelnents for 2011. Walton denied that FPS received any payments for services that wete prov'ided bv FHG uhe trustee, Msi Spetgel, provided the Creditors with the documents in its possession, but these docuxnents did not clarify the Issues.

17] On November 6, 2013, the day after the examination, the Creditors commenced a motion, returnable December 18, for an order requiting Walton eo be examined in his personal capacity and as an officer and director of FPS. They did without lifdng the sty in the FHG bankruptcy. As a result, Justice Matheson dismissed the Creditors' modon with costs against them in f.he amount of $2,500 but without prejudice to che Creditors Light to bring such a motion in the futuxe in the proper way undet the BIA.

[8] The frustee maintains that FHG is without assets, but does n.ot oppose this motion. ON November 7, 2013, the Eustee stated that the FHG estate has not assets,

Issues

[9] The issue in ±.is motion is simply whether the Creditors have showa "sufficient cause" to justify an order for an examination by them Of Walton in his personal capacity and as an office: and dircctor of FPS "for the purpose of investigating che administration of the estate OF' FHG, as specified by section 163(2) of the BIA?

Analysis

[10] A leading case as to the test to be applied in such a motion is the decision ofJusEce D, M, Brown in Re Josipavitz [2012] OJ 4464 (Ont.S.C.J.). At paragraph 14 of his decision, Justice Brown sated that the moving party must provide evidence that:

> i.thc examination seeks infotmatiotl relevant to some aspect of the adrministxatÅon of tho estatc, including the existence of assets or liabilities of the banktupc or the accounting for them; and
>
> E, the petson sought Co be examined likely posscsscs inforrnation which may shed some light on the estate Ot[a] its administradon.

[11] He made it cleat in paragraphs 14 and 15 that the test was a low one. He cautioned that the court should not allow a [4]fishing expedition" without any reasonable basis in fact, and should not allow a creditor to use che secdon to pursue a private remedy. FinallY+ he clarified that. the purpose

of thc ptoposed investigation need not just be to addtcsg something "amiss" with the administfaüon of the estate. All that needs to be proven, according to Justice Brown, is chac "the examination likely will secure infotmaåon requited by the trustee to continue with ot complete the admin-isttaåon Of the estate of the bankrupt,"

[12] refexence to "amiss" relates to the catlier decisions of Registrar Nettie in Re .Bonzary Estate [20051 OJ 5539 (Regi$ffar) and che Nova Scotia Court of Appeal in Re NSC Diesel Power Inc. (1997), 49 C.B.R. (3d) 213 (N.S.CSaC.) wherein the Byo courts described the test as requiting evidence of something being "amiss" in the adminisbadon of the estate. J ustice Brown's discussion rightfully clacified that the usc of the word "amiss" in these decisions does not dcflcct the focus of the judicial inqu-l.ry in such a modort, which should remain on the question of whether the invesågation will advance the administraüon of the bankruptcy estate and whether the person proposed to be examined tnay have information in that regard.

[13] Applying ff.is test to the facts evident in chis motion* I have concluded that the proposed examinaåon of Walton in his personal capacity and as an officet and ditcctot of FPS meets the test, *Ihe evidence questions as to whether assets that belong to FEIG, namely accounts receivable for services rendered, wcte paid Out to Walton personally ot were transferred to FPS at a time when FHG was insolvent and was known by Walton to be insolvent. The evidence indicates that Walton is che one best suited to answer these questions. He is the owner of FHG aüd FPS, Such transfers, if so provcn, could be overturned and assets potentially returned to the estate.

[1 4] Mr. Rosenberg argued that the C.teditots should have made appropriate inquiÅes of the trustee in order to allow the &useee to pursue the remedies available to him. The has not done so to date based on the existing examinations and disclosures by the bankrupt Indeed, the Eustee takes the position that the FHG escace has not assets, The cases ace clear that the requested order can be given even whcfc the trustee is satisfied as to the admioistxation of thc estate; see Re Boozary Esta/c [20051 OJ 5539 (Onta S.C.J.) ac paragraph 5,

[15] Mr. Rosenberg argued that the Creditors were seeking a private remedy. J was somewhat puzzled by this position. The cases I was referred to in arguiment concerned proposed exarninations by secured creditors; see .Re BradJhrd [2003] CatswellOnt 1784 (Ont. S.C.J.) and Re David, 2010 ABQB 358. In such cases there is an obvious concern chat the creditors will try to use the proposed examinations to advance che.if security and not to benefit the bankruptcy estate. nrat is not the case here as the Creditors are unsecured judgment creditors, I was not mnde aware of any private remedy chat the Creditors are pursuing.

[161 \Vhcn pressed on this point, Mr. Rosenberg pointed to what he maintained was a personal vendetta by the Creditors aga.inst Walton. In my view, whether such a vendetta is being pursued is irrelevant to the question of whether the examination may in the end benefit the estate and whether Walton may have information in that regard.

[17] Rosenberg argued that this examinaåon was premature, a.s the bankrupt had been examined 13 months ago. L do not agree, That exanmnation was of the bankrupt, not of FPS and Walton personally.

[18] l, therefore, grant the modon both as to the requested examination and as to chc documents the Creditors see.k to have Walton produce in advance of the examination,

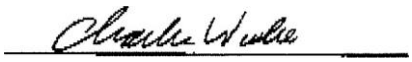
Costs:

1.19] At the conclusion of argument comscl submitted their costs outlines. The Creditors* CHO$t.s Outline shows a claim of $7,276.09 in substantial indemnity costs and $6,518-99 in partial indemnity costs, with a total of 27 hours spent by two lawyet$ and a secretary on the

motåon,, Walton's Costs Outline shows a claim of $2,617.25 in patdal indemnity costs, with a total of about •1 1 houn spent by one lawyer on the motiona

[20) The Creditors clearly succeeded in this modon and 'Ate therefore entitled tc.) costs. Howevet, the reasonable expectation of Walton concerning his liability for costs was not in the order of what is being claimed by the Creditors- In addition, I find that che motion vas not complex. Furthermore, thc quantum of what is claimed by the Creditors is excessive given what was included in the motion mateüd. On the other hand* Walton's position on this motion was somewhat tenuous, given the evidence.

[21] Considering all of these factors, I award the Creditors $4,000 in costs for this motion to be paid to them by Walton ia 30 days fr6m the date of this order.



MASTER C. WIEBE

DATE: December 22, 2014

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