

CITATION: Re Fox Health Group 2014 ONSC7405  
COURT FILE NO.: 31-1785631  
DATE: December 22, 2014

**SUPERIOR COURT OF JUSTICE - ONTARIO**  
(In Bankruptcy and Insolvency)

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

**BEFORE:** MASTER C. WIEBE

**COUNSEL:** Andrew Ostrum for Charles Koehler and Career Dynamics Network Inc., together  
the "Creditors" (the moving parties);

Harold Rosenberg for Allan Walton, "Walton" (the responding party).

**HEARD:** December 16, 2014 at Toronto, Ontario.

**REASONS FOR DECISION**  
(Motion for examination)

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**Introduction**

[1] The Creditors seek an order under section 163(2) of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c.B-3 as amended (the "BLA") authorizing the Creditors to examine Walton both in his personal capacity and as director and officer of 2052005 Ontario Inc. operating as Fox Psychological Services ("FPS"). The Creditors also seek production of books, documents, correspondence and papers in the power and possession of Walton and FPS concerning the subject bankruptcy. The bankrupt is a company related to FPS, namely Fox Health Group Inc. ("FHG").

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

**Background**

[3] The following facts are not disputed. On July 24, 2012 the Creditors obtained a consent judgment against FHG in the amount of \$200,000. Walton was the sole director and officer of FHG and is the sole officer and director of FPS.

[4] Walton did not attend on four examinations in aid of execution. Two of these were arranged with Walton's consent. Walton did not 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 complaint he later withdrew on August 13, 2013. On August 7, 2013, Justice Chiappetta ordered that Walton attend on an examination on September 9, 2013.

[5] On September 6, 2013, FHG filed as assignment in bankruptcy. Despite the automatic stay, Walton consented to proceed with his examination by the Creditors on November 5, 2013, as ordered by Justice Chiappetta.

[6] At his examination, Walton stated that FHG and FPS operated out of the same premises, that they both provided psychological services, that FHG provided other services as well, that FPS started operating after FHG ceased operating, that FHG had \$180,818 in accounts receivable as of August 31, 2010, that FHG's accounts receivable declined to \$60,021.16 as of April 16, 2013, that this decline in accounts receivable was due to the receipt of payments and write-offs none of which were corroborated by documents, that FHG's bank account was closed on May 31, 2012, that Walton was the only recipient of management fees from FHG, that these fees more than doubled between 2009 and 2010, and that FHG did not prepare financial statements for 2011. Walton denied that FPS received any payments for services that were provided by FHG. The trustee, Msi Spergel, provided the Creditors with the documents in its possession, but these documents did not clarify the issues.

[7] On November 6, 2013, the day after the examination, the Creditors commenced a motion, returnable December 18, 2013, for an order requiring Walton to be examined in his personal capacity and as an officer and director of FPS. They did this without lifting the stay in the FHG bankruptcy. As a result, Justice Matheson dismissed the Creditors' motion with costs against them in the amount of \$2,500 but without prejudice to the Creditors right to bring such a motion in the future in the proper way under the *BLA*.

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

### Issues

[9] The issue in this motion is simply whether the Creditors have shown "sufficient cause" to justify an order for an examination by them of Walton in his personal capacity and as an officer and director of FPS "for the purpose of investigating the administration of the estate of" FHG, as specified by section 163(2) of the *BLA*?

### Analysis

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

- i. the examination seeks information relevant to some aspect of the administration of the estate, including the existence of assets or liabilities of the bankrupt or the accounting for them; and
- ii. the person sought to be examined likely possesses information which may shed some light on the estate or its administration.

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

of the proposed investigation need not just be to address something "amiss" with the administration of the estate. All that needs to be proven, according to Justice Brown, is that "the examination likely will secure information required by the trustee to continue with or complete the administration of the estate of the bankrupt."

[12] The reference to "amiss" relates to the earlier decisions of Registrar Nettie in *Re Boozary Estate* [2005] OJ 5539 (Registrar) and the Nova Scotia Court of Appeal in *Re NsC Diesel Power Inc.* (1997), 49 C.B.R. (3d) 213 (N.S.C.S.C.) wherein the two courts described the test as requiring evidence of something being "amiss" in the administration of the estate. Justice Brown's discussion rightfully clarified that the use of the word "amiss" in these decisions does not deflect the focus of the judicial inquiry in such a motion, which should remain on the question of whether the investigation will advance the administration of the bankruptcy estate and whether the person proposed to be examined may have information in that regard.

[13] Applying this test to the facts evident in this motion, I have concluded that the proposed examination of Walton in his personal capacity and as an officer and director of FPS meets the test. The evidence raises questions as to whether assets that belong to FHG, namely accounts receivable for services rendered, were paid out to Walton personally or were transferred to FPS at a time when FHG was insolvent and was known by Walton to be insolvent. The evidence also indicates that Walton is the one best suited to answer these questions. He is the owner of FHG and FPS. Such transfers, if so proven, could be overturned and the assets potentially returned to the estate.

[14] Mr. Rosenberg argued that the Creditors should have made appropriate inquiries of the trustee in order to allow the trustee to pursue the remedies available to him. The trustee has not done so to date based on the existing examinations and disclosures by the bankrupt. Indeed, the trustee takes the position that the FHG estate has no assets. The cases are clear that the requested order can be given even where the trustee is satisfied as to the administration of the estate; see *Re Boozary Estate* [2005] OJ 5539 (Ont. S.C.J.) at paragraph 5.

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

[16] When pressed on this point, Mr. Rosenberg pointed to what he maintained was a personal vendetta by the Creditors against 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] Mr. Rosenberg argued that this examination was premature, as the bankrupt had been examined 13 months ago. I do not agree. That examination was of the bankrupt, not of FPS and Walton personally.

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[18] I, therefore, grant the motion both as to the requested examination and as to the documents the Creditors seek to have Walton produce in advance of the examination.

**Costs:**

[19] At the conclusion of argument counsel submitted their costs outlines. The Creditors' Costs 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 lawyers and a secretary on the motion. Walton's Costs Outline shows a claim of \$2,617.25 in partial indemnity costs, with a total of about 11 hours spent by one lawyer on the motion.

[20] The Creditors clearly succeeded in this motion and are therefore entitled to costs. However, 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 the motion was not complex. Furthermore, the quantum of what is claimed by the Creditors is excessive given what was included in the motion material. 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 in 30 days from the date of this order.

  
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MASTER C. WIEBE

**DATE:** December 22, 2014

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