

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEBRASKA

FILED  
DISTRICT OF NEBRASKA  
JAN 28 1985  
William L. Olson, Clerk

IN THE MATTER OF: )  
)  
HIBBERD & JONES, INC., a/k/a )  
HIBBERD & JONES CONTRACTORS, )  
INC., )  
)  
Debtor. )  
)  
KEARNEY CRETE AND BLOCK )  
COMPANY, INC., a corporation, )  
)  
Appellant, )  
)  
v. )  
)  
HIBBERD & JONES, INC., a/k/a )  
HIBBERD & JONES CONTRACTORS, )  
INC., and JOHN WOLF, TRUSTEE, )  
)  
Appellees. )  
)

CV. 84-0-192

BK. 82-1140

A. 83-29

MEMORANDUM OPINION

Plaintiff appeals an order of the bankruptcy court dismissing its complaint on grounds that plaintiff lacked standing. Specifically the issue presented is whether a creditor has standing to object to the trustee's designation of one of two estates as the proper estate of assets turned over to the trustee by the third party. The Court finds the creditor does have standing under the facts of this case and accordingly reverses the order of the bankruptcy court.

Plaintiff is the Kearney Crete & Block Company (KCB) and it extended credit amounting to \$16,688.19 to Hibberd and Jones Contractors, a Nebraska Partnership (HJ Partnership) for materials delivered. Plaintiff

brought suit in the District Court of Buffalo County against HJ Partnership to recover on the debt and also obtained a prejudgment garnishment against Central Contracting of Kearney (CCK). CCK is a general contractor who allegedly owed about \$12,000 to the HJ Partnership.

HJ Partnership and its related company, Hibberd and Jones, Inc. (HJ, Inc.), a defendant herein, both filed bankruptcy in the fall of 1982 (Bk. 82-1440, Filing No. 6 and Bk. 82-1780, Filing No. 1). Both HJ Partnership and HJ, Inc., estates named as trustee John Wolf (trustee), who is also a defendant herein. CCK was ordered by the trustee to turn over the \$12,000 and the trustee deposited and recorded the proceeds as property of HJ, Inc., estate.

Plaintiff did not have a claim against HJ, Inc., estate and filed an adversary proceeding in the bankruptcy court contending that the funds should have been recorded and deposited as property of the HJ Partnership estate (A. 83-39). The bankruptcy court ruled that plaintiff lacked standing to object to the designation made by the trustee as to which estate would enjoy the proceeds (A. 83-29, Tr. 6:10-16, 9:7-24). Plaintiff thereupon brought this appeal.

Section 323 of the 1978 bankruptcy code provides that "a trustee [of an estate in bankruptcy may] be sued." 11 U.S.C. § 323(b). Rule 701 of the Bankruptcy Rules implicitly authorizes who may bring a cause of action against the trustee in bankruptcy and for what purpose:

The rule of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to . . . (2) determine the validity . . . of [an] . . . interest in property . . . . Such a proceeding shall be known as an adversary proceeding.

Bankr. Rule 701(a). (Emphasis added).

From Section 323 of the Bankruptcy Code and Rule 701, a "party" may bring a cause of action against a trustee to determine the validity of an interest in property. In the instant case, plaintiff seeks to determine the validity of HJ, Inc., estate's interest in the \$12,000 transferred by the trustee.

Rule 17 of the Federal Rules of Civil Procedure sets forth who is a "party" to an action in federal court: "Every action shall be prosecuted by the real party in interest." Fed.R.Civ.P. 17(a). Rule 717 of the Bankruptcy Rules provides that: "Rule 17 of the Federal Rules of Civil Procedure applies in adversary proceedings." Bankr. Rule 717(b). In the instant case, therefore, the question becomes whether plaintiff is a "real party in interest" who may litigate the validity of the \$12,000 held by the HJ, Inc., estate.

In *Warth v. Seldin*, 422 U.S. 490, the Supreme Court discussed the question of standing and the real party in interest:

In essence the question of standing is whether the litigant is entitled to have the court decide the merits of this dispute or particular issues. . . . The standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and

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to justify exercise of the court's remedial powers on his behalf. . . . A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action . . . . [Moreover], the plaintiff generally must assert his own legal rights and interest and cannot rest his claim to relief on the legal rights or injuries of third parties. *Id.* at 498-99.

The Eighth Circuit Court of Appeals in *Kapp v. Naturelle, Inc.*, 611 F.2d 703 (8th Cir. 1979), considered the question of standing in a bankruptcy case where creditors objected to claims made against an estate. The *Kapp* court held:

[Former bankruptcy code sections and rules] provide that claims may be objected to by "parties in interest." The term "party in interest" is not defined in the bankruptcy Act. Courts construing the provision have reasoned that the interest must be a pecuniary interest in the estate to be distributed. *Id.* at 706 (Emphasis added).

In the instant case, the plaintiff has a "pecuniary interest" in the outcome of the litigation. Plaintiff has filed a claim only against the HJ Partnership estate, and if the \$12,000 proceeds held by CCK are distributed among creditors of HJ, Inc., plaintiff will be denied its claim to the proceeds. Although the *Kapp* decision arises under factually different circumstances, the Court finds the requirement of a "pecuniary interest" applicable to the instant case.

No case found specifically considers the issue raised in the instant case, but the Court finds case law discussing consolidation of bankruptcies between related corporations, analogously helpful. In

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*In re Snider Bros., Inc.*, 18 B.R. 230 (D.Mass. 1982), several related corporate debtors filed for bankruptcy and the creditors' committee recommended that the estates be consolidated. Plaintiff was a creditor of one of the debtors who objected to the consolidation. The *Snider* court stated that not only could the creditor object, but the creditor may be entitled to denial of consolidation:

A creditor who has looked solely to the credit of its debtor and who is certain to suffer more than minimal harm as a result of consolidation may be entitled to denial of a request for consolidation. *Id.* at 238.

Similar to *In re Snider*, plaintiff is a creditor of only one debtor, HJ Partnership, and plaintiff looked solely to the credit of HJ Partnership when it extended credit. Moreover, plaintiff will suffer more than minimal harm if the \$12,000 is improperly designated as property of the HJ, Inc., estate.

The trustee takes the position that plaintiff does not have standing to direct the trustee to turn over the \$12,000 to the HJ Partnership estate. The trustee relies on Sections 363, 541 and 542 as the basis for his argument. The trustee argues that Section 542 provides exclusive authority for the trustee to order CCK to turn over the \$12,000 and for the trustee's deposit of these proceeds into the HJ, Inc., estate. Section 542(a) provides in pertinent part:

[A]n entity . . . in possession . . . of property that the trustee may use, sell or lease . . . shall deliver to the trustee . . . such property . . . 11 U.S.C. § 542(a) (Emphasis added).

Section 542 provides that property is to be turned over to the trustee but only property that the trustee "may use, sell or lease." Section 542 does not define the property a trustee has authority to control. Other statutory sections must be consulted to determine the type of property the trustee "may use, sell or lease."

Section 363(b) provides that "the trustee may use, sell or lease . . . property of the estate." 11 U.S.C. § 363(b). (Emphasis added). Section 541 defines "property of the estate" as "all legal or equitable interests of the debtor." 11 U.S.C. § 541(a)(2).

The trustee's statutory argument fails for the reason that it has yet to be determined whether the \$12,000 is a "legal or equitable interest" of HJ, Inc. *State of Missouri v. U. S. Bankruptcy Court, etc.*, 647 F.2d 768 (8th Cir.), *cert. denied*, 454 U.S. 1162 (1981). The trustee of HJ, Inc., cannot assert a right to assets of another estate, even when the trustee also represents the other estate. *Lancaster v. Key*, 24 B.R. 897 (E.D.Tenn. 1982); *In re Snider*, 18 B.R. 230 (D.Mass. 1982).

The decision here is also supported analogously by bankruptcy laws providing for reclamation proceedings. 11 U.S.C. § 546(c). Reclamation proceedings "afford the opportunity to claimants not in possession to assert their claims or title to various property in the hands of the trustee or receiver . . ." 4A *Collier on Bankruptcy*, ¶ 70.39 at 466 (4th ed. 1978). Cf. *Robbins v. Bostian*, 138 F.2d 622 (8th Cir. 1943). Plaintiff's adversary proceeding here asserts claims to property not in plaintiff's possession that is held by the trustee. Plaintiff should be afforded an opportunity to assert claims against the \$12,000 held by the trustee.

For the foregoing reasons, the Court finds that plaintiff has standing to object to the trustee's designation of one of two estates as the proper estate of assets submitted to the trustee by a third party.

Accordingly, the order of the bankruptcy court dismissing plaintiff's complaint is hereby reversed and the case remanded to the bankruptcy court for further proceedings consistent with this opinion. A separate order will be entered accordingly.

BY THE COURT:

*William E. DeFazio*

JUDGE, UNITED STATES DISTRICT COURT