

IN THE MATTER OF

CASE NO. BK80-1478

A80-423

Plaintiff

VS.

Defendant

This matter comes on for hearing upon the defendant's motion to dismiss. At the hearing on the motion to dismiss, the defendant offered an affidavit (Exhibit No. 1) which the Court receives in evidence.

Defendant argues that the plaintiff's complaint fails to state a cause of action because of it fails to allege that the transfers alleged as preferences are not alleged to be transfers of property of the plaintiff. However, as to both transfers, the plaintiff alleges that the transfers were made from third parties to defendant "rather than to plaintiff." It is inferable from this allegation that John Fayhee & Sons, Inc., and Sprinkler Irrigation Supply Company paid money to defendant rather than to plaintiff. At least one inference is that the money which was paid to defendant represented an account receivable or similar contract right which was property of the plaintiff. If plaintiff is able to support this inference or one similar, the result is a transfer of property of the plaintiff.

The affidavit offered in evidence at the motion to dismiss does not negate this allegation or inferences from it. It may be that the facts alleged in the Exhibit No. 1 are true and that the specific transaction referred to in the exhibit was a sale of a receivable. However, plaintiff's complaint arguably relates to a separate transfer of a receivable due the plaintiff from the third parties.

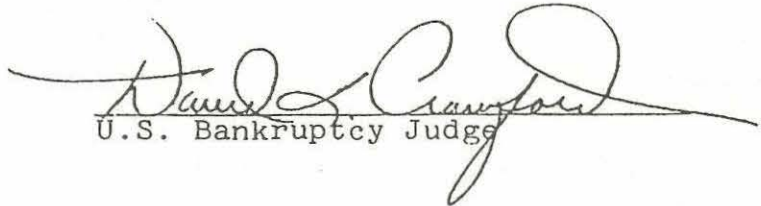
While it may be possible to resolve this dispute by a motion for summary judgment or some other proceeding short of a full trial, this motion to dismiss is not the vehicle to do so. Accordingly, it is

ORDERED that the motion to dismiss filed herein by the defendant be, and the same hereby is, denied; and it is further

ORDERED that the defendant file its answer within fourteen days from the date of this order.

DATED: May 12, 1981.

BY THE COURT:

  
U.S. Bankruptcy Judge

Copies mailed to each of the following:

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