

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
ROBERT'S SHEET METAL CO.,) CASE NO. BK79-0-82
)
ALLEGED BANKRUPT)
)
J-G SALES CO., GREENHECK FAN)
CORPORATION, and WHOLESAL HEATING)
AND COOLING SUPPLIES COMPANY,)
Petitioning Creditors)
)
vs.)
)
ROBERT'S SHEET METAL CO.,)
Alleged Bankrupt)

MEMORANDUM OPINION

This is an involuntary proceeding brought by the petitioning creditors against Robert's Sheet Metal Co. for the purpose of having Robert's Sheet Metal Co. adjudged a bankrupt. The matter was presented by way of written stipulation together with exhibits and depositions.

The stipulation discloses that each of the petitioning creditors is properly a petitioning creditor and that the unsecured indebtedness of the alleged bankrupt exceeds \$1,000.00. The acts of bankruptcy alleged by the petitioning creditors will be discussed in the order in which they appear in the original petition and in the amended petition subsequently filed.

Paragraph 4A of the original petition alleges that the alleged bankrupt obtained materials and supplies from the petitioning creditors and delivered the same to others for use in construction projects. The petitioning creditors allege that this is a fraudulent transfer. However, the facts which substantiate this indicate that the alleged bankrupt obtained materials and supplies from various of the petitioning creditors for use on construction projects which the alleged bankrupt had contracted to provide. There is nothing in the evidence to disclose that there is any type of fraudulent transfer involved here. The use of the materials and supplies on the construction projects was done under a contractual arrangement which provided for payment to the alleged bankrupt or the right to payment for the materials and supplies furnished. Accordingly, there is no evidence of a lack of fair consideration as that term is used in §67d [11 U.S.C. §107d]. Nor is there any evidence before me to suggest that the use of the materials and supplies was done with any type of intent to hinder, delay or defraud any creditors of the alleged bankrupt. This discussion also disposes of Paragraph 5D of the amended petition. I should add that the failure to pay the petitioning creditors for materials and supplies obtained from them does not in any way transform a debtor-creditor relationship into a fraudulent transfer.

In their brief, the petitioning creditors have abandoned Paragraph 4B of their original petition and the allegation will not be further discussed.

Paragraph 5C of the petitioning creditors' amended petition alleges that real property owned by the alleged bankrupt was transferred as a fraudulent transfer and without adequate consideration with the intent to hinder, delay, or defraud existing and future creditors. Here, again, the allegation is pursuant to §67d. The factual support for this allegation is that in January of 1979, a deed from the corporation was given to another corporation and recorded with the Register of Deeds, all within one year of the filing of the involuntary petition which occurred on January 26, 1979. Factual background is necessary. Mrs. Karen K. Taylor is the president of Robert's Sheet Metal Co. and the owner of all the stock of the corporation. Apparently the corporation ceased to do business in December of 1978. In January of 1979, title to property owned by the corporation known as 210 Park Drive in Elkhorn, Douglas County, Nebraska, and more particularly described by the legal description incorporated in the stipulation was deeded to Remly Corporation. All of the stock of Remly Corporation is owned by Mr. Monte M. Taylor, the present husband of Karen K. Taylor. The deed was signed by Karen K. Taylor. Mr. Taylor's deposition testimony offers perhaps the best explanation of the transaction:

"Q Do you know who the shareholders in the Remly Corporation are?

A I am. I'm 100%. It was a new corporation that I just set up for this purpose.

Q Are you also one of the officers and directors?

A Yes.

Q Has the bank started foreclosure on that property in Elkhorn?

A Not to my knowledge, no. I talked to them about it and they know what I'm trying to accomplish. As a footnote(sic), I might say(sic) that my main concern is the fact that there are about \$11,500.00 in federal employers tax owing, for which Karen is personally exposed, and there is probably approximately \$1,000.00 in state employers' taxes, and my hope is that, if the building can be sold well enough that there will be sufficient funds, after the payment of mortgages, to cover those taxes, and we were concerned that if it just went through a normal foreclosure situation, being sold under distress, that the building might get bid in just for the amount of the mortgages --"

Having reviewed the evidence, I conclude that the petitioning creditors failed to meet their burden of proving that the transfer was without fair consideration as that term is defined in §67d.

The petitioning creditors bear the burden of proving the facts essential for their involuntary petition and there is no evidence before me from which I can find by a preponderance of the evidence that the consideration, if any, was not fair. Accordingly, the petitioning creditors may not prevail under sub-divisions a, b or c of §67d(2).

Accordingly, it is necessary to examine whether or not the facts are sufficient to determine under sub-section (d) of §67d(2) whether the transfer was:

" . . . as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors."

In dealing with sub-section (d) of §67d(2), it is often times impossible to obtain direct evidence to support the allegation and use of the well-known "badges of fraud" is necessary. The badges of fraud have appeared as early as Twyne's Case, 3 Coke 80b, 76 Eng. Rep. 809 (1601). Using a similar analysis, I note that the corporation ceased business in December, 1978, shortly prior to the time the deed was given. A bank which was a secured lender on the corporation's accounts receivable began collection of those accounts receivable to satisfy an indebtedness due it. The corporation has been insolvent for a relatively long period of time. The deposition evidence seems to suggest that the transfer was made to avoid a foreclosure sale. How this transfer could assist in preventing a foreclosure sale is beyond me, particularly since the deed which made the transfer expressly states that the transfer is subject to a mortgage to the Bank of Elkhorn and a deed of trust to the Omaha National Bank. In addition, the deposition explanation appears to suggest that the transfer was made to preserve an equity, if any, to assist in paying Mrs. Taylor's potential personal liability for federal and state employer's taxes. This, of course, suggests that the property was put out of the reach of other creditors yet, somehow, held for the benefit of Mrs. Taylor and her corporation. In addition, given the unpaid bills of the alleged bankrupt, it probably is not unfair to suggest that the corporation expected lawsuits to be brought which, if judgments were obtained, would become liens on real estate owned by the corporation. In addition, the transfer of the property avoided the potential of a federal or state tax lien being filed on the property which might prevent a potential sale.

All in all, given the foregoing circumstances, this Court concludes that the transfer of the real estate was done with the actual intent at least to hinder or delay existing or future creditors and, as such, falls within the statutory language.

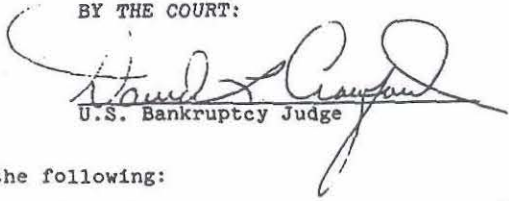
Paragraph 5E of the amended petition apparently alleges a preference to the attorney for the alleged bankrupt. However, the evidence before me discloses no more than that a payment was made to the attorney for the corporation for work which he "had been doing and planning(sic) on doing on behalf of Robert's."

That brief explanation is insufficient, in my judgment, to disclose an antecedent debt as opposed to a debt which was contemporaneous with and to be incurred in the future on behalf of the corporation. I conclude that the petitioning creditors have failed to meet their burden of proof with regard to this allegation. There is nothing in the evidence to suggest that the vehicles which were sold which produced the money to pay the attorney were sold as a fraudulent conveyance, either for lack of fair consideration or with intent to hinder, delay, or defraud.

Based upon the foregoing, I conclude that my finding is in favor of the petitioning creditors on the allegation with regard to the real estate and in favor of the alleged bankrupt with regard to the other allegations. A separate order of adjudication will be entered in accordance with the foregoing.

DATED: June 13, 1979.

BY THE COURT:


U.S. Bankruptcy Judge

Copies mailed to each of the following:

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