

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
GODMOTHER'S PIZZA, INC.,) CASE NO. BK78-0-418
)
BANKRUPT)
)
JAMES J. STUMPF, Trustee,)
)
Plaintiff)
)
vs.)
)
KENNETH J. McCULLOCH,)
)
Defendant)

MEMORANDUM OPINION

The plaintiff, as trustee in bankruptcy, brought this adversary proceeding to require the defendant to surrender possession of certain restaurant equipment and fixtures which allegedly belong to this bankruptcy estate.

On December 30, 1976, the defendant entered into an agreement with ROL Distributing Co., Inc., whereby the defendant agreed to sell the stock of Godmother's Pizza, Inc., to ROL Distributing Co., Inc. The purchase price was \$65,000.00 plus the value of any inventory less any liabilities of the corporation. The purchase price was payable by a down payment of \$100.00 with a \$9,900.00 payment due March 1, 1977 with further installments thereafter.

The agreement for sale provides that the defendant is to have a security interest in the stock of Godmother's Pizza, Inc., until all payments are made.

ROL Distributing Co., Inc., was unable to make the payments as specified in the sale agreement. As a result, on December 17, 1977, ROL Distributing Co., Inc., authorized the defendant to take possession of the assets which were the subject of the prior sale agreement. The defendant took possession of the assets and subsequently sold the bulk of the assets of the corporation to a third party. The defendant retains possession of certain assets of the corporation. Godmother's Pizza, Inc., filed a voluntary petition in bankruptcy with this Court on April 5, 1978.

It is important to note that Godmother's Pizza, Inc., did not owe any money to the defendant by reason of the purchase agreement by ROL Distributing Co., Inc. The indebtedness was owed to the defendant by ROL Distributing Co., Inc. In addition, it is fair to conclude that Godmother's Pizza, Inc., at least became insolvent when it conveyed all its assets to the defendant on December 17, 1977. As a result, Godmother's Pizza, Inc., made a fraudulent conveyance within the meaning of §67d(2) of the

Bankruptcy Act [11 U.S.C. §107d(2)] which provides:

"Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent;"

In the present case, the corporation, Godmother's Pizza, Inc., received no fair consideration for the transfer of its assets to the defendant. ROL Distributing Co., Inc., may have received a fair consideration by the cancellation of certain indebtedness owed by it to the defendant. Nevertheless, the bankrupt corporation received no consideration.

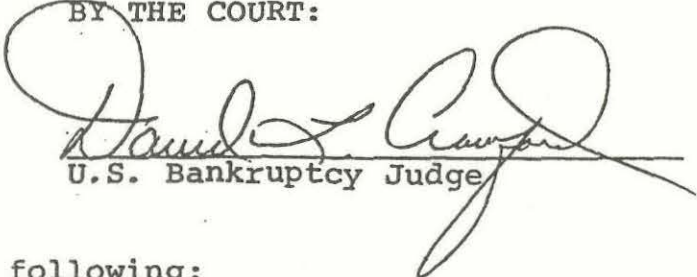
Resulting from the foregoing is the conclusion that, as prayed for, the prayer of the plaintiff's complaint should be granted and the defendant required to deliver possession of the property which he holds which was conveyed to him by the bankrupt corporation. The assets are listed on the exhibit attached to this memorandum opinion.

The defendant has requested that he be given credit for storage costs and transportation costs which he has incurred in preserving the assets held by him. My conclusion is that the defendant should be granted a period of sixty days from the date of this memorandum opinion in which to file a claim for administration expense.

A separate order is entered in accordance with the foregoing.

DATED: June 28, 1979.

BY THE COURT:


U.S. Bankruptcy Judge

copies mailed to each of the following:

James J. Stumpf, Attorney, 530 Univac Building, Omaha, Nebr. 68106

D. L. Pelton, Attorney, Box 369, Bellevue, Nebr. 68005