

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
MARV McINTOSH, INC.,)	CASE NO. BK88-1121
)	A91-8159
<u>DEBTOR(S)</u>)	
)	CH. 11
JAMES J. STUMPF, Liquidating)	
Agent,)	Filing No.
Plaintiff(s))	
vs.)	
)	
CALIFORNIA PROVISIONS OF)	
SACRAMENTO, INC., a)	
California Corporation, d/b/a)	
Supreme Provisions and)	
QUALITY MEATPACKING CO., INC.,)	
a California Corporation,)	
d/b/a Supreme Provisions,)	
)	
<u>Defendant(s)</u>)	

MEMORANDUM

Hearing was held on the above adversary complaint on June 16, 1992. Appearing on behalf of the plaintiff was Donald Swanson of Koley, Jessen, Daubman & Rupiper, P.C., Omaha, Nebraska. Appearing on behalf of the defendant Quality Meatpacking Co., Inc., was Wm. Hadley of Hadley Law Office, Omaha, Nebraska.

This Chapter 11 bankruptcy case was filed on July 12, 1988. Within ninety days before the filing of the petition, the debtor delivered to the defendants on an unsecured obligation debtor's check in the sum of \$12,451.53 payable to "Supreme Provisions" on Invoice No. 4686.

This check was delivered in payment of a claim for damages held by one or both of the defendants arising out of the debtor's delivery of spoiled meat, for which payment demand had previously been made verbally and by Invoice No. 4686. A delay of days or weeks occurred between the time demand was made for payment upon debtor and actual payment by the debtor.

The parties agree that the factual elements of an avoidable preference set forth in 11 U.S.C. § 547(b)(5) exist in this case, subject only to certain defenses discussed below.

The initial defense is a claim by the defendants that the funds represented by the check were not part of the debtor's estate as defined in Section 541 of the Bankruptcy Code because those funds were the proceeds of an insurance policy owned by the debtor which the debtor received only because of an obligation it owed to the defendants as a result of delivery of spoiled meat. Defendants claim that debtor, an interstate trucking company, hauled meat for the defendants and, as a result of negligence, the meat spoiled. The loss to the defendants was approximately \$35,000.00. A claim was made upon the debtor for the loss and the debtor turned the claim over to an insurance carrier. The \$12,451.53 was paid by the insurance carrier to the debtor on the loss.

According to the defendants, the debtor had no equitable interest in the insurance proceeds and held such proceeds in constructive trust for the benefit of the defendants.

Absolutely no evidence was presented on such a defense and, other than statements made in the preliminary pretrial statement, there is nothing in the record which would support such a defense.

Therefore, on this element of the defense, the plaintiff has proved, by a preponderance of the evidence, that an avoidable preference exists and defendants have failed to overcome such proof.

The second defense is that plaintiff's claim is barred by a written Settlement Agreement and Release. During the bankruptcy case, the debtor initiated an adversary proceeding (A88-0288) against defendant Quality Meatpacking Co. (QMC) for the sum of \$16,161.00 for alleged accounts owing from QMC to the debtor. On December 9, 1988, according to QMC, the debtor and QMC orally negotiated a Settlement Agreement including the following express terms:

1. QMC recognized an account owing to plaintiff in the sum of \$16,161.96.

2. Debtor acknowledged a \$22,940.00 obligation to QMC pursuant to debtor's failure to properly refrigerate and transport QMC's products.

3. The parties recognized and acknowledged QMC's setoff rights and further recognized that after such setoff, debtor remained indebted to QMC for the sum of \$6,778.00.

4. QMC agreed to voluntarily reduce its unsecured claim to \$5,000.00 and to affirmatively vote for confirmation on debtor's pending Chapter 11 plan.

5. The parties agreed to release each other from all claims existing on such date and

6. Debtor agreed to dismiss the adversary proceeding with prejudice.

On February 2, 1989, QMC executed a written Settlement Agreement and Release pursuant to the foregoing Settlement Agreement. At the same time QMC filed its Proof of Claim for \$5,000.00 unsecured and tendered debtor a valid ballot in favor of debtor's Chapter 11 plan.

QMC undertook such action in reliance upon the Settlement Agreement with debtor.

There are several problems with this defense. First of all, there is no admissible evidence with regard to the underlying basis for the Settlement Agreement and Release. The settlement document is in evidence. The complaint in A88-0288 is also in evidence. The complaint is for monies due debtor for services rendered. The settlement document recites that the debtor has a claim against the defendant "to recover monies due the estate for trucking services performed by Marv McIntosh for The Goldstein Entities" and the "Goldstein Entities have filed a claim against Marv McIntosh for damage and loss sustained by Quality Meatpacking Co. d/b/a Supreme Provision."

There is no recitation of the amount of either claim.

The settlement document further states that the parties release each other from all past claims, known or unknown, "except for an unsecured claim in the amount of \$6,678.00 which claim the Goldstein Entities will pursue through the bankruptcy proceedings of Marv McIntosh."

The settlement document, which is admitted into evidence as Exhibit 7, was executed post-petition by the debtor-in-possession. A proof of claim was then filed which states that the claim is for \$6,778.00 "which claimant will voluntarily reduce to \$5,000.00." It is signed in the name of the creditor, Frederick J. Goldstein.

The ballot submitted by Frederick J. Goldstein is in the amount of \$5,000.00. That ballot was dated December 22, 1988.

The ballot and proof of claim dealing with a claim of \$5,000.00 was submitted pursuant to a proposed plan of reorganization which would have paid unsecured claimants with claims of \$5,000.00 or less approximately 50% upon confirmation. That plan, although confirmed, eventually had the order of confirmation revoked. Another plan was then confirmed which provided that plaintiff James Stumpf would be appointed as

liquidating agent, liquidate all of the assets of the debtor and distribute such assets on a pro rata basis to the unsecured claims.

All claim holders received notice of the new plan and had the opportunity to change the ballots and the opportunity to amend the claims.

This Court questions whether the ballot and the proof of claim filed by Frederick Goldstein are valid. Mr. Goldstein is not listed as a creditor in any amount and there is no evidence that there has been a proper assignment of a claim to Mr. Goldstein from Quality Meatpacking Co. or any other entity.

Mr. Goldstein chose not to appear at the trial. Therefore, there is no admissible testimony from him concerning what occurred in this case. Counsel for QMC did submit a written, unsworn, statement from Mr. Goldstein concerning what he would testify to if he were present.

Giving the defendant the benefit of the doubt, based upon the documentary evidence that has been presented by the defendant, the Court could, if it stretched, give relief to the defendants based upon a complete settlement of all disputes between the parties.

However, the Settlement Agreement, which may or may not be valid outside of bankruptcy, is not binding upon the debtor-in-possession or the successor liquidating agent because it was entered into by the debtor-in-possession with no notice to any other party. Fed. Bankr. R. 9019 requires that any compromise be noticed to interested parties and that a hearing be held at which time the Court may approve such compromise or settlement.

Neither the debtor-in-possession nor the settling defendants provided notice and an opportunity for hearing as required by Fed. Bankr. R. 9019(a). Therefore, neither the Court nor any creditor had the opportunity to review the appropriateness of the settlement which directly affected the rights of other unsecured creditors.

The provisions of Fed. Bankr. R. 9019(a) are mandatory and without such compliance any proposed settlement is not binding upon the debtor. In re Blehm Land & Cattle Co., 71 Bankr. 818 (D. Colo. 1987).

The defendants did not have the right to rely upon a post-petition settlement agreement without such agreement being approved by the Court. Even if they did so rely, out of ignorance or otherwise, they did not detrimentally rely. Although their claim was allegedly reduced to \$5,000.00 and a ballot was tendered in support of the initial plan, such actions

do not have an everlasting effect upon the rights of the defendant. The plan was not properly confirmed and a second plan was submitted for balloting. The defendants had the opportunity to reballot and reject the second plan. They also had the opportunity to amend the claim to accurately reflect the total amount of the claim and any right to offset. In addition, they had the right to request reconsideration of the claim already approved. See Fed. Bankr. R. 3008.

Within ninety days of the bankruptcy filing, the debtor had a claim against the defendants for approximately \$16,000.00 for services rendered. The defendants had a claim against the debtor for approximately \$35,000.00 for negligent destruction of meat. Had there been no payment by the debtor within the ninety days prior to bankruptcy, the defendants could have filed a claim for \$35,000.00 less the \$16,000.00 offset of monies owed by the defendants to the debtor, resulting in an unsecured claim of approximately \$19,000.00. The debtor would have retained the \$12,451.53 which might have been available for eventual distribution. The defendants would have received a pro rata share of that amount. However, because of the procedures used by the debtor and claimholder and the failure to inform all interested parties and the Court, the claimholder has benefitted to the detriment of the estate. The defendant received \$12,451.53 in actual cash and has an unsecured claim of \$5,000.00 which should share on a pro rata basis with other claims.

The defendants received a voidable preference in the amount of \$12,451.53. The defenses to the avoidable preference action are not well taken, in that a settlement agreement entered into post-petition by a debtor-in-possession is not valid nor binding upon the estate without the appropriate notice and court approval.

Therefore, judgment shall be entered in favor of plaintiff and against defendant Quality Meatpacking Co., Inc., in the amount of \$12,451.53 plus interest at the federal rate from July 12, 1988, plus costs. A separate judgment has been entered against defendant California Provisions of Sacramento, Inc., d/b/a Supreme Provisions.

Separate journal entry to be entered.

DATED: September 10, 1992.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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)	CH. 11
JAMES J. STUMPF,)	
Liquidating Agent,)	Filing No.
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
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CALIFORNIA PROVISIONS OF)	
SACRAMENTO, INC., a)	
California Corporation, d/b/a)	
Supreme Provisions and)	
QUALITY MEATPACKING CO., INC.,)	
a California Corporation,)	
d/b/a Supreme Provisions,)	
<u>Defendant(s)</u>)	DATE: September 10, 1992
)	HEARING DATE: June 16,
)	1992

Before a United States Bankruptcy Judge for the District of Nebraska regarding adversary complaint.

APPEARANCES

Donald Swanson, Attorney for plaintiff
Wm. Hadley, Attorney for defendant Quality Meatpacking Co., Inc.

IT IS ORDERED:

Judgment is entered in favor of the plaintiff and against the defendant Quality Meatpacking Co., Inc., in the amount of \$12,451.53 plus interest at the federal rate from July 12, 1988, until paid, plus costs.

(X) Clerk to give immediate notice of the Court's ruling to all parties in interest.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge