

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
STEVEN C. SOUERS and	:	Case No. 93-971-CH
MARY C. SOUERS,	:	
	:	Chapter 7
Debtors.	:	
ROSEN'S, INC.,	:	Adv. No. 96-96174
Plaintiff,	:	
	:	
vs.	:	
	:	
STEVEN C. SOUERS; MARY C. SOUERS,	:	
MID IOWA FLOTATION EQUIPMENT	:	
COMPANY; DONALD SOUERS; DAVID	:	
L. SOUERS; MARCIA WENNER; CENTRAL	:	
IOWA FS, INC.; and CURTIS ZEISNEISS	:	
d/b/a C. ZEISNEISS & SON,	:	
Defendants.	:	

**RULING--APPLICATION FOR APPOINTMENT OF RECEIVER
AND ISSUANCE OF PRELIMINARY INJUNCTION--MOTION TO DISMISS
AND ALTERNATIVE MOTION TO ABSTAIN**

Plaintiff's Application for Appointment of Receiver and Issuance of Preliminary Injunction, and the Motion to Dismiss and Alternative Motion to Abstain filed by the Defendants, Steven C. Souers and Mary C. Souers, came on for hearing on September 20, 1996. Plaintiff (hereafter "Rosen's") appeared by its attorneys of record, James H. Cossitt and David G. Stork; the Debtors/Defendants, Steven C. Souers and Mary C. Souers, appeared by their attorney of record, Jerrold Wanek; the Defendants, Mid Iowa Flotation Group Company, Donald Souers, David L. Souers, and Marcia Wenner (hereafter the "MIF Group") appeared by their attorney of record, D. Scott Simpson; and, the Defendant Curtis Zeisneiss d/b/a Curtis Zeisneiss & Son (hereafter "Zeisneiss"), appeared by his attorney of record, William T. Talbot.

The motion to continue the hearing by the MIF Group was orally denied on September 19, 1996.

During the course of the hearing, Debtors orally made a motion to withdraw the reference.

The court dictated findings and conclusions and the proposed ruling into the record and this ruling is a memorialization of that ruling.

FINDINGS OF FACT

1. Debtors filed a voluntary chapter 7 petition on April 12, 1993.
2. On June 14, 1996, this Court entered its order in the adversary proceeding captioned “Rosen’s, Inc., Plaintiff, vs. Steven C. Souers and Mary C. Souers, Defendants, State Bank and Trust Company, Intervenor, vs. Steven C. Souers and Mary C. Souers, Defendants,” Adversary Proceeding No. 93-93080.
3. The objections to Steven Souer’s discharge were sustained and his discharge was denied pursuant to 11 U.S.C. 727(a)(4); a money judgment was entered in favor of Rosen’s against Steven Souers in the amount of \$47,189.00 plus interest and costs, including attorneys fees; and, the complaint was dismissed as to the Debtor, Mary C. Souers.
4. This judgment was appealed but a Writ of Supersedeas was not issued.
5. The Sheriff of Story County, Iowa, executed upon the judgment and levied upon crops, farm machinery and equipment believed to belong to Steven Souers. The execution was returned as unsatisfied when Mary Souers claimed sole ownership in the crops, and a joint interest in the machinery and equipment which she claimed as exempt property.

6. The adversary proceeding, sub judice, was then commenced with the filing of the complaint on August 23, 1996.

7. Count I alleges that there is a conspiracy by Steven and Mary Souers to place the property of Steven Souers beyond the reach of creditors; any purported sole ownership interest in the crops constitutes a fraudulent conveyance under Iowa law; and, pursuant to Iowa Code Chapter 630 (1995), relief should be granted to Plaintiff, including the appointment of a receiver.

8. Count II alleges that Mary Souers entered into a lease with Ziesneiss to lease a hog facility located on the Souers farm. Rosen's alleges that the purported sole interest of Mary Souers in these lease payments is part of a conspiracy by Steven and Mary Souers to place property belonging to Steven beyond the reach of his creditors and constitutes a fraudulent conveyance under the Iowa law. Rosen's prays for an accounting, a money judgment against Steven and Mary Souers and Ziesneiss, and other relief including the appointment of a receiver, and an injunction pursuant to Iowa Code § 630.7 forbidding any transfer or other disposition or interference with any property in which Steven Souers is alleged to have an interest.

9. Count III alleges a cause of action against Steven Souers, Mary Souers, Donald Souers, David Souers, Marcia Wenner, and Mid Iowa Flotation Equipment Company, in that they engaged in conduct which constitute a pattern of racketeering activity in violation of 18 U.S.C. § 1962, et seq., hereinafter referred to as RICO. Rosen's prays for treble damages, costs of suit and attorneys fees, and relief pursuant to Iowa Code Chapter 630, including the appointment of a receiver.

JURISDICTION

Pursuant to Fed.R.Bankr.P. 7012(b)(1), the Debtors/Defendants, Steven and Mary Souers, challenge the jurisdiction of this Court to try the complaint because this Court lacks subject matter jurisdiction.

This Court disagrees with this contention as to Counts I and II, as both counts relate to this Court's ability to enforce a monied judgment entered by this Court. A court has not only the right, but a duty to enforce its decree. Porto Rico v. Rosaly, 227 U.S. 270, 276 (1913); 11 U.S.C. § 105(a). Additionally, bankruptcy courts have jurisdiction over all core proceedings arising in a case under title 11; core proceedings include proceedings to determine, avoid, or recover fraudulent conveyances. 28 U.S.C. § 1334(b), 11 U.S.C. § 157(b)(1), § 157(b)(2)(H).

The Eighth Circuit has held that in the absence of a controlling federal statute, the district court has the same authority to aid judgment creditors in supplemental proceedings which is that provided to state courts under local law. H.H. Robertson Co. v. U.S. DiCarlo Gen. Contr., 994 F.2d 476, 477 (8th Cir. 1993). This is a supplemental proceeding, and a creditor's bill is available under Iowa law. Iowa Code §§ 630.16 - 630.18 (1995); see also Tullis v. Tullis, 235 Iowa 428, 16 N.W.2d 623 (1944); Central Fibre Products Co. V. Lorenz, 246 Iowa 384, 66 N.W.2d 30 (1954); Garton v. Garton, 533 N.W.2d 828 (1995).

The bankruptcy rules incorporate by reference Fed.R.Civ.P. 69 et. seq. The Court concludes that the bankruptcy court has jurisdiction over supplemental proceedings as alleged in Counts I and II.

The Court also disagrees with the assertion that it does not have subject matter jurisdiction over Count III, the RICO count, because it is related to a case under title 11. See 18 U.S.C. § 1334(b).

WITHDRAWAL OF REFERENCE

Withdrawal of the reference of an adversary proceeding is governed by 28 U.S.C. § 157(d) which provides as follows:

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

The RICO statute governs enterprises engaged in, or the activities of which affect, interstate or foreign commerce and as such falls within the provisions of 28 U.S.C. § 157(d). See 18 U.S.C. § 1962(a)-(c). This Court recommends to the District Court that this adversary proceeding be withdrawn as Count III requires consideration of both title 11 and title 18 which regulates organizations or activities affecting interstate commerce.

This Court also recommends that Counts I and II also be withdrawn as this Court would recommend that the District Court abstain from this proceeding as discussed in the following section.

ABSTENTION

Abstention is governed by 28 U.S.C. § 1334 and 11 U.S.C. § 305. Since this is an adversary proceeding, abstention under § 305(a) will not be addressed.

There are two types of abstention under § 1334(c): (1) mandatory abstention under § 1334(c)(2) in which a court must abstain if certain requirements are met; and (2) discretionary abstention under § 1334(c)(1). Voluntary abstention under 1334(c)(1) is appropriate in the interest of

justice, the interest of comity with State courts, or in respect for State law. Voluntary abstention is appropriate in this proceeding. This conclusion is based upon consideration of the following factors as set forth in Williams v. Stefan, 133 B.R. 119, 123 (Bkrcty N.D. Ill. 1991).

Abstention will not affect the administration of the estate as any recovery will not inure to the benefit of the estate. Rosen's is attempting to recover upon a judgment which is for the benefit of a creditor not the estate.

State law issues predominate. Plaintiff is relying upon Iowa Code Chapter 630 as a basis for all three counts. These issues do not appear to be difficult or uncertain, but the state law issue predominates over bankruptcy issues as to Counts I and II. Although Count III has been pled under 18 U.S.C. §§ 1963 and 1964, state courts have concurrent jurisdiction over civil RICO claims. Tafflin v. Levitt, 493 U.S. 455, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990). The state court can resolve all issues in this adversary proceeding

The issues in this proceeding have little or no degree of relatedness to the bankruptcy.

There does not appear to be an issue of forum shopping by any of the parties.

An action has not been filed in the state courts, but the filing of a petition can be expedited and remedies are available under state law which would protect the rights of all parties.

PRELIMINARY INJUNCTION

The Plaintiff prays for the issuance of a preliminary injunction pursuant to Fed.R.Bankr.P. 7065(a) and Iowa Code § 630.7. Plaintiff prays that the Defendants be enjoined from taking any action during the pendency of this proceeding to transfer, encumber, or otherwise dispose or interfere with any property in which Steven Souers is alleged to have an interest. Included among this property are

crops and proceeds thereof which are located on a 78-acre farm purportedly jointly owned by the Defendants, Steven and Mary Souers. Harvest season is drawing near and Plaintiff is concerned about the harvest and sale of grain raised on the farm.

Bankruptcy Rule 7065, Injunctions, incorporates by reference FRCP 65. The Eighth Circuit has set out a four-pronged test as to whether a preliminary injunction should issue. Dataphase Systems, Inc. v. C L. Systems, Inc., 640 F.2d 109, 112 (8th Cir. 1981). The four factors are:

- (1) the threat of irreparable harm to the movant;
- (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties' litigants;
- (3) the probability that movant will succeed on the merits; and
- (4) the public interest.

“At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.” Id. at p. 113. None of the four factors by itself is determinative, but, in each case, the factors must be balanced to determine whether they tilt toward or away from granting the preliminary injunction. West Pub. Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 1222 (8th Cir. 1986).

The threat of irreparable harm to Rosen's is present. There is a substantial judgment against Steven Souers which is presently on appeal. The findings for that judgment show that Steven Souers has engaged in subterfuge in his past business dealings.

The crops may be harvested within a very short time and moved to market very quickly. The proceeds from these crops could very easily be lost, insofar as Plaintiff is concerned, within a short time.

An execution has been returned unsatisfied when Mary Souers, wife of Steven, claimed an undivided interest in those crops. This is a change from the time when the bankruptcy petition was filed; at that time the crops were claimed to be jointly held.

In balancing the harm and the injury that granting the injunction would have on the other parties' litigant, maintaining the status quo can be preserved with little or any injury to the Defendants.

These considerations outweigh a determination as to whether or not Rosen's will succeed on the merits and the public interest, if any, in this matter.

A preliminary injunction should issue preventing Steven and Mary Souers from harvesting, transferring, encumbering, or disposing of the crops and proceeds thereof which are now located on the 70-acre farm purportedly jointly owned by Defendants Steven and Mary Souers. Any action by Steven and Mary Souers in this regard should be permitted only after notice to the other parties. A 10-day notice is reasonable under the circumstances.

RECEIVER

Rosen's has prayed for the appointment of a receiver to take charge of the crop which is still connected to the real estate, all livestock and feed, all farm program payments, and the lease payments for the lease of the hog facility on the Souers farm.

11 U.S.C. § 105(b) provides that a bankruptcy court may not appoint a receiver in a case under Title 11.

Rosen's cites the case of In re Cassidy Land and Cattle Co., Inc., 836 F.2d 1130 (8th Cir. 1988) for the proposition that a bankruptcy court may appoint a receiver in a foreclosure proceeding. In Cassidy the trustee in a chapter 11 case initiated foreclosure proceedings in the bankruptcy court and

a receiver was appointed at the request of a trustee. It was held that the bankruptcy court properly appointed a receiver in that proceeding in that § 105(b) did not address the power to appoint a receiver in an adversary proceeding. The Cassidy court at page 1133 held that the bankruptcy judge has the power under § 105(b) to appoint a receiver in lieu of a trustee.

In re Memorial Estates, Inc., 797 F.2d 516, 520 (7th Cir. 1986) stands for the proposition that § 105(b) is not addressed to the power of the bankruptcy court to appoint a receiver in a separate controversy between a creditor and the debtor or between two creditors. Memorial Estates was cited with approval by the 8th Circuit in Cassidy Land and Cattle Co., supra, 836 F.2d at 1133.

Under the rationale of Cassidy Land and Cattle Co. and Memorial Estates, this Court would be within its jurisdiction to appoint a receiver as the receiver would not be a receiver for the bankruptcy estate but would be an equity receiver.

However, a receiver should not be appointed at this time when the present circumstances of the proceeding are considered. The rights of Rosen's may be protected without the appointment of a receiver subject to further review by a court of competent jurisdiction.

IT IS ACCORDINGLY ORDERED, as follows:

(1) That Steven C. Souers and Mary C. Souers are enjoined from taking any action during the pendency of this proceeding to transfer, encumber, or otherwise dispose of the crops and proceeds thereof which are located on the 78-acre farm jointly owned by Steven and Mary Souers, subject to a 10-day notice to all the parties in this proceeding including their attorneys of record; and

(2) The appointment of a receiver is denied.

IT IS FURTHER THE RECOMMENDATION of this court that the district court withdraw the reference of this adversary proceeding and that the district court in the interest of comity with the Iowa District Court and respect for the Iowa law abstain from hearing this proceeding.

Dated this _____ day of October, 1996.

RUSSELL J. HILL, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT