

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
AMERICAN SECURITIE.C; & LOAN, : Case No. 84-1230-W
INC., :
Debtor. :
ROBERT F. CRAIG, Trustee, : Adv.Pro.No. 87-0296
Plaintiff, :
V. : Chapter 11
FEDERAL DEPOSIT INSURANCE :
CORPORATION, IN ITS CORPORATE :
CAPACITY AND AS RECEIVER FOR :
SEDGWICK COUNTY BANK, :
Defendant. :

ORDER ON MOTION TO DISMISS

On December 29, 1987 the trustee filed a complaint against the Federal. Deposit Insurance Corporation (FDIC) alleging American Securities and Loan, Inc. (ASL) made preferential and fraudulent transfers to Sedgwick County Bank of Julesburg, Colorado in violation of 11 U.S.C. sections 547 and 548. The bank failed and the Colorado State Banking Commissioner appointed the FDIC as receiver of the bank. The trustee prays for a judgment against the FDIC in its capacity as receiver and in its corporate capacity. On January 29, 1989 FDIC, in its corporate capacity, filed a motion to dismiss for failure to state a claim upon which

relief could be granted.

In considering a motion to dismiss, a court must view the facts alleged in the complaint in a light most favorable to the plaintiff. Schever v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.E(A.2d 80 (1957). A complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Price v. Moody, 677 F.2d 676, 677 (8th Cir. 1982), quoting Conley, 355 U.S. at 45-46, 78 S.Ct. at 101-102.

The FDIC asserts that the trustee alleges no facts that suggest the FDIC in its corporate capacity (FDIC-C) is liable for the alleged preferences and fraudulent conveyances. In support of its argument, the FDIC cites cases that hold that FDIC-C is not liable for the debts of a failed bank. See FDIC v. LaRambla Shopping Center, 791 F.2d 215 (1st Cir. 1986); In re F&T Contractors, 718 F.2d 171 (6th Cir. 1983).

Under the guiding principle expressed above, the FDIC's motion must be overruled. First, the trustee is not pursuing a debt of the failed bank. Rather he seeks to recover sums that the debtor purportedly transferred to the failed bank in a preferential or fraudulent manner.

Secondly, the court is persuaded by the reasoning set out in In re First City Financial Corp., 61 B.R. 95 (Bankr. D. N.M. 1986) and In re LaMancha Aire, Inc. v. FDIC, 41 B.R.

647 (Bankr. S.D. Fla. 1984). In First City, the debtor filed an action against the FDIC alleging that transfers made to a bank that later failed were avoidable preferences under section 547. The FDIC moved to dismiss on the ground that federal law governing the FDIC immunized it from section 547 actions. In rejecting this argument, the court stated that "neither the Bankruptcy Code (Title 11) nor the National Bank Act (Title 12) contains language suggesting that FDIC should be treated differently from other creditors under the Code." First City, 61 B.R. at 96. In La Mancha a bank had perfected a security interest in the debtor's airplane within 90 days of the filing of the debtor's bankruptcy. The debtor in possession sought to avoid this grant of a security interest as a preferential transfer under section 547. As in the First City case, the FDIC argued that federal law governing the FDIC exempted the FDIC from operation of the Bankruptcy Code. The court held that such federal law "affords no basis to exempt the FDIC from a federal statutory cause of action, provided to assure equitable distribution of an insolvent debtor's assets to its creditors." La Mancha, 41 B.R. at 649.

CONCLUSION AND ORDER

WHEREFORE, for the reasons expressed above, the court finds that the trustee's complaint sets forth sufficient facts to support his claim that he is entitled to relief

under 11 U.S.C. section 547 and 548.

THEREFORE, the FDIC's motion to dismiss is denied.

Signed and dated this 31st day of May, 1988.

LEE M. JACKWIG
CHIEF U.S. BANKRUPTCY JUDGE