UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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January 11, 1999

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Subject: *Elliott v. Ziegmann (In re Elliott)*,
Adversary No. 98-4027;
Chapter 7; Bankr. No. 97-40901

Dear Counsel:

The matter before the Court is Count I of Plaintiffs-Debtors' Second Amended Complaint. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that judgment must be entered for Defendants.

FINDINGS OF FACT

Debtors purchased a restaurant and bar from the Ziegmanns. The "Purchase Agreement" was drawn by Attorney Roger Gerlach, who was selected by the real estate broker and who performed legal work for all the parties. The Agreement acknowledged that a bank would hold the first mortgage and that the Ziegmanns would have a second mortgage for a portion of the sales price not paid at closing. The Agreement provided:

> [T]he Buyer has had full and complete opportunity to inspect the goods and property which she is agreeing herein to purchase; that this inspection was conducted by the Buyer in person, and that she is relying upon her own inspection in making her judgment as to the quality and quantity of the goods which she is purchasing. This purchase is not based upon any representation of the Seller, or any agent of the Seller, with respect to the

> condition of any of the property, and the Sellers make no warranty with respect thereto whatsoever, except that the Sellers hereby warrant that the equipment is in a good state of repair and working order and the Buyer is purchasing the goods and property in "AS IS" [emphasis in original] condition.

Under the Agreement, either party could seek damages for a breach of the Agreement.

Debtors took possession of the property on January 2, 1997. Debtors experienced problems with some restaurant equipment, the sewer system, and the cooling system during the first year and a half of operation. The problems that Debtors and their former kitchen manager and sometimes cook, Terry Wallace, identified and the remedies that Debtors selected included:

1. The grill's temperature was difficult to regulate, it was dirty, it leaked grease, the spillage pans did not fit, and the pilot would not stay lit. Debtors purchased a new, larger grill shortly after taking possession.

2. The chest freezer did not seal properly. Several months after purchase, Debtors replaced the freezer. The old freezer is still used by Debtors to store "odds and ends."

3. The walk-in cooler was not holding its temperature. The compressor quit working at least once when an evaporator fan was turned off. Its painted, wooden shelves were replaced with new wire shelves shortly after Debtors took possession.

4. The dishwasher had some sort of problem that was repaired within a month or so of Debtors taking possession.

5. The ice machine had to be cleaned or repaired often, starting soon after Debtors took possession. Debtors asked for and received from the Ziegmanns some tips on keeping it running. During breakdowns, Debtors sometimes had to buy ice. Debtors removed the ice machine from service in May 1998 and now buy all their ice.

6. The small beer cooler in the bar began having drainage problems six months after Debtors took possession. The cooler's compressor was awaiting repair on the first day of the trial.

7. Small repairs to the heating system were made shortly after possession. The electronic control for a ventilator fan went out in September 1998 and had to be repaired. The east air conditioner also had a leak in the condenser that had to be soldered. It needed additional repairs as of the first day of the trial.

8. Debtors had the sewer line cleaned in early spring 1997. The Ziegmanns last had it cleaned in March 1996.

The Ziegmanns had purchased most of the restaurant equipment used in 1991 or 1992 and had used it hard until the business was sold. The rooftop heating and cooling systems were new when the building was reconstructed in 1991 or 1992 after a fire. Debtors knew that the restaurant equipment was not new at the time they purchased it. Debtors had an opportunity to inspect all the restaurant equipment and the heating and cooling systems before the sale closed.

Repairmen Dennis Wingen, Duane Pulse, and Larry Werner each testified that the equipment repairs they made in 1997 and 1998 at Debtors' request were normal in this type of business, including the grill based on its age. None of these service people indicated that Debtors experienced an inordinate amount of repairs. None thought the Ziegmanns had been derelict in maintaining and repairing the equipment before the sale. Their testimony was supported by the repair statement from Iron Wheel Sales and Service for work performed for the Ziegmanns. Pulse, who had performed much of the Ziegmanns' repairs and who had a working knowledge of most of the equipment prior to sale, stated that it was in good working order at the time of the sale.

Trent Banks, the Ziegmann's cook in 1996 and a cook for Debtors for several months, said the restaurant equipment was in good working order while the Ziegmanns ran the place but that there were a few problems when Debtors and their new employees initially operated the place.

Other than seeking assistance in keeping the ice machine running, neither Debtors nor their attorney complained to the Ziegmanns about problems with the equipment or to claim a breach of the Agreement. Debtors did not include any claim against the Ziegmanns in their schedule of assets when they filed bankruptcy.

CONCLUSIONS OF LAW

Debtors observed the condition of the restaurant equipment and heating and cooler system prior to the sale to their satisfaction. They were not denied any access nor given any false information by Ziegmanns or the real estate agent before they took possession.

Debtors failed to give timely notice to the Ziegmanns of any problems with the restaurant equipment, the heating and cooling system, and the sewer system. Debtors had several opportunities to do so but did not until after they filed bankruptcy and commenced this adversary proceeding. Debtors also failed to include any claim against the Ziegmanns in their schedule of assets. While this failure to give timely notice may impact Debtors' remedies under S.D.C.L. ch. 57A-2, its greatest import is as evidence that no problems existed at the time of the sale.

Debtors failed to show that the restaurant equipment, the heating and cooling system, or the sewer system was not in a good state of repair and working order when the sale was closed. The problems with the grill, ice machine, the walk-in cooler, and the chest freezer that Debtors experienced after the sale were not unusual for used equipment of that age and degree of use. The problems with this equipment that Debtors encountered were not caused by the Ziegmanns' failure to maintain it. The Ziegmanns were not aware that Debtors may be required by health inspectors to replace the wooden shelves in the walk-in cooler when Debtors took possession. Debtors replaced, rather than repaired, the grill because they wanted a larger one. Cleaning the sewer line was part of regular maintenance. Problems with the dishwasher were not clearly established as to type and time.

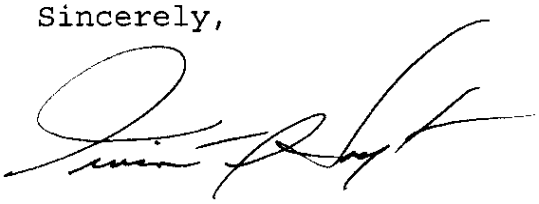
The testimony of the various repairmen, cook Trent Banks, and Maxwell Supply salesman Larry Werner was more credible than Debtors'. Their testimony established that the Ziegmanns regularly maintained the restaurant equipment, the heating and cooling system, and the sewer system and that this equipment and systems were in working order at the time Debtors took possession.

The problems that Debtors' experienced with the air conditioner and the small beer cooler were not contemporaneous with the sale. Their deficiencies cannot be attributed to a failure of the Ziegmanns to sell it in a good state of repair and in working order.

Absent written condemnation reports or testimony from a state or city inspector, the Court cannot conclude that Debtors had to replace the chest freezer, the wooden shelves in the walk-in cooler, or the ice machine or that their deficiencies existed at the time of the sale.

An order directing judgment for Defendants shall be entered.

Sincerely,



Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh

CC: adversary file (docket original; copies to parties in interest)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JAN 11 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

JAN 11 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By M. Kay Rees

Case: 98-04027 Form id: 122 Ntc Date: 01/11/1999 Off: 4 Page : 1
Total notices mailed: 7

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