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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May 25, 2000

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Subject: ***Lovald v. Jensen***
***(In re Thomas W. Tyler)***
Adversary No. 00-4007
Chapter 7; Bankr. No. 98-40686

Dear Counsel:

The matter before the Court is Defendants Rolland E. Jensen's and J.R. Rawlins, Inc.'s motion for summary judgment. This is a core proceeding under 28 U.S.C. § 157(b)(2)(H). This letter decision and subsequent order and judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the transfer of the property described in Trustee-Plaintiff John S. Lovald's complaint herein was not a fraudulent transfer within the meaning of 11 U.S.C. § 548. Summary judgment shall therefore be entered for Defendants Rolland E. Jensen and J.R. Rawlins, Inc.

**Summary of facts.** On May 1, 1998, Don Tyler Insurance, Inc. ("Tyler, Inc.") sold its "book of business" for certain insurance companies to "Rawlins/Tyler Inc." for the sum of $13,400.00. On August 20, 1998, Thomas W. Tyler ("Debtor"), the sole shareholder, sole director, and sole officer of Tyler, Inc., filed for relief under chapter 7.

On March 31, 2000, Chapter 7 Trustee John S. Lovald ("Trustee Lovald") filed an adversary complaint against Rolland E. Jensen

("Jensen") and J.R. Rawlins, Inc. ("Rawlins, Inc.").[1] In his complaint, Trustee Lovald alleged that the above-described transfer was a fraudulent transfer within the meaning of 11 U.S.C. § 548.

On April 12, 2000, Jensen and Rawlins, Inc. filed their answer, in which they admitted the above-described transfer took place, but denied Trustee Lovald's characterization of it as a fraudulent transfer. On that same date, Jensen and Rawlins, Inc. filed a motion for summary judgment, supported by Attorney Salter's affidavit, Jensen's affidavit, a statement of undisputed material facts, and a memorandum of law.

On May 10, 2000, Trustee Lovald filed an objection to Jensen's and Rawlins, Inc.'s motion. Trustee Lovald's objection was supported by his affidavit and a memorandum of law. The matter was taken under advisement.[2]

**Summary judgment.** Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." F.R.Bankr.P. 7056 and F.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein).

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992) (quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and citations therein). Where motive and intent are at issue, disposition of the matter by summary judgment may be more difficult. *Cf. Amerinet*, 972 F.2d at 1490 (citation omitted).

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[1] The record is not altogether clear as to the relationship between and among "Rawlins/Tyler Inc.," "Rawlins/Tyler Insurance," and "J.R. Rawlins, Inc." However, the Court need not speculate as to the nature of that relationship, as it is not relevant to the issue before it.

[2] Jensen and Rawlins, Inc. subsequently filed a Motion to Strike Affidavit of John S. Lovald on May 24, 2000. That motion has been rendered moot by the Court's ruling on Jensen's and Rawlins, Inc.'s motion for summary judgment.

The movant meets his burden if he shows that the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997 (quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273, (8th Cir. 1988)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (citation therein); *Handeen*, 112 F.3d at 1346.

If the movant meets his burden, however, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY Systcm, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995).

**Fraudulent conveyance.** To prevail under 11 U.S.C. § 548(a)(1)(B),[3] a trustee must establish:

> (1) that the debtor had an interest in property;
>
> (2) that a transfer of that interest occurred within one year of the filing of the bankruptcy petition;
>
> (3) that the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and
>
> (4) that the debtor received "less than a reasonably equivalent value in exchange for such transfer."

*BFP v. Resolution Trust Corporation*, 511 U.S. 531, 535 (1994). For the purposes of Jensen's and Rawlins, Inc.'s motion, the parties have limited their arguments to the first element.

In determining whether Debtor had an interest in Tyler, Inc.'s "book of business," the Court is bound by state law. *See Barnhill*

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[3] Trustee Lovald did not specify whether he intended to proceed under § 548(a)(1)(A) (actual fraud) or (B) (constructive fraud). However, because he did not plead an "actual intent to hinder, delay, or defraud," and because his allegations more closely track the elements of § 548(a)(1)(B), the Court presumes he intended to proceed under § 548(a)(1)(B).

*v. Johnson*, 503 U.S. 393, 398 (1992) (citations omitted). On this point, the law in South Dakota is quite clear:

> "A firmly entrenched doctrine of American law is the concept that a corporation is considered a legal entity separate and distinct from its officers, directors, and shareholders, unless there is a sufficient reason to the contrary." This Court has long recognized this doctrine as well.

*Osloond v. Osloond*, 609 N.W.2d 118, 121 (S.D. 2000) (citations omitted). Officers, directors, and shareholders do not have an interest in corporate assets. *See id.* at 122 (limiting a sole shareholder, officer, and agent's "interests" in his closely-held corporation to his monthly salary and his right to year-end profits). *See also State v. Mudie*, 115 N.W. 107, 110 (S.D. 1908) (citations omitted) ("[C]orporators have no legal interest in the corporate property . . . Shareholders are not tenants in common or co-owners of the property of the corporation in any sense; but the title thereto rests in the legal entity, called the 'corporation.'"). Thus, under South Dakota law, Debtor did not have an interest in Tyler, Inc.'s "book of business."

Trustee Lovald appears to concede the general rule. However, he argues that "[w]ithout the physical presence of a properly licensed agent or broker" (*i.e.*, Debtor), Tyler, Inc. could not have done business as an insurance agency. While this is undeniably true, it does not provide a basis for disregarding the corporate entity and treating Tyler, Inc.'s assets as belonging to Debtor. The same could be said about *any* corporation, which can only act through its officers, agents, and employees.

Trustee Lovald also argues that an exception should be made in this case under the two-prong test recognized in *Osloond*. Under that test, the "corporate veil" may be pierced if:

> . . . there was such unity of interest and ownership that the separate personalities of the corporation and its shareholders, officers or directors are indistinct or non-existent; and
>
> . . . adherence to the fiction of a separate corporate existence [would] sanction fraud, promote injustice or inequitable consequences or lead to an evasion of legal obligations.

*Osloond*, 609 N.W.2d at 122 (citing *Kansas Gas & Electric Company v. Ross*, 521 N.W.2d 107, 112 (S.D. 1994)).

Trustee Lovald argues that because Debtor is the sole shareholder, sole director, and sole officer of Tyler, Inc., the first prong is "easily met" in this case. However, he must establish much more than that:

> The [first] prong is meant to determine whether the stockholder and the corporation have maintained separate identities . . . In determining whether the personalities and assets of the corporation and the stockholders have been blurred we consider (i) the degree to which the corporate legal formalities have been maintained, and (ii) the degree to which individual and corporate assets and affairs have been commingled.

*Kansas Gas & Electric Company*, 521 N.W.2d at 112 (citation omitted).

Trustee Lovald has not alleged that Debtor and Tyler, Inc. failed to maintain the requisite corporate formalities or that their assets and affairs were commingled. He has not identified specific facts that would support such a finding. Jensen and Rawlins, Inc., on the other hand, have offered uncontroverted proof, in the form of Tyler, Inc.'s articles of incorporation, the Secretary of State's certificate of incorporation, Tyler, Inc.'s annual reports, and various purchase agreements and loan documents, that corporate legal formalities were carefully observed, at least until Tyler, Inc. was administratively dissolved on September 17, 1999. Trustee Lovald cannot satisfy the first prong of the *Osloond* test.

Trustee Lovald's arguments with respect to the second prong focus on Jensen's conduct. For example, Trustee Lovald points out that Jensen "was a corporate employee for nine months"; that he "knew of [Debtor's] disabilities" and "the imminent loss of [Debtor's] license"; and that he "took advantage of the situation to acquire the property at a forced sale value." However, it is the conduct of Debtor and Tyler, Inc., not that of Jensen, that is at issue:

> [T]he showing of inequity necessary to satisfy the second prong must flow from the misuse of the corporate form. . . . It is only when the shareholders disregard the separateness of the corporate identity and when that act of disregard causes the injustice or inequity or constitutes the fraud that the corporate veil may be pierced.

*Kansas Gas & Electric Company*, 521 N.W.2d at 113 (citation omitted).

Trustee Lovald has not alleged that Debtor and Tyler, Inc. in any way disregarded the separateness of the corporate entity. He has not identified specific facts that would support such a finding. Absent some evidence of such an act of disregard, the Court cannot find a resulting injustice, inequity, or fraud. Accordingly, Trustee Lovald has not satisfied the second prong of the *Osloond* test.

**Conclusion.** Trustee Lovald has failed to advance specific facts to create a genuine issue of material fact for trial. Jensen and Rawlins, Inc. are entitled to judgment as a matter of law.

Defendants' Motion for Summary Judgment is granted, and judgment shall be entered in their favor dismissing this adversary.[4] The parties shall bear their own costs and attorney fees.

The Court will enter an appropriate order.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT SEAL

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.

MAY 2 6 2000

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

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

MAY 2 6 2000

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

INH:sh

cc: adversary file (docket original in adversary; serve copies on counsel for each party and U.S. Trustee)

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[4] Joining Tyler, Inc. as a party plaintiff in this adversary proceeding, as Trustee Lovald suggested in his memorandum of law, is not a viable alternative to granting Defendants' motion for summary judgment. Tyler, Inc. has no standing to bring an action under § 548(a)(1)(B). Moreover, joining Tyler, Inc. as a party plaintiff would not alter the Court's conclusion that Debtor did not have an interest in Tyler, Inc.'s "book of business," a necessary prerequisite to an action under § 548(a)(1)(B). However, nothing in this decision precludes an action by or on behalf of Tyler, Inc. in an appropriate forum.

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Total notices mailed: 5

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