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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

UNPUBLISHED OPINION

In re MEACHAM-BROWN CENTER, INC., Debtor.	Bankruptcy Case No. 84C-00585
ROGER G. SEGAL, Trustee, Plaintiff. -vs- ANDREA BENNETT, Defendant.	Civil Proceeding No. 84PC-1618 MEMORANDUM DECISION AND ORDER

APPEARANCES

John T. Morgan, Cohne, Rappaport & Segal, Salt Lake City, Utah, for plaintiff; Frank J. Gustin, Gustin, Adams, Kasting & Liapis, Salt Lake City, Utah, for defendant.

CASE SUMMARY

This matter is before the Court on the defendant's motion to dismiss the above-entitled adversary proceeding commenced by the trustee to set aside and recover alleged preferences and fraudulent conveyances. The Court is called upon to decide whether the debtor's failure to comply with the requirements of Section 42-2-5, Utah Code Ann. (Repl. 1981) regarding filing of a certificate for doing business under an assumed name, precludes

the bankruptcy trustee from maintaining an action under his avoiding powers. For the reasons hereinafter set forth, the Court concludes that the trustee possesses the capacity to sue to recover preferences and fraudulent conveyances, notwithstanding the pre-petition debtor's noncompliance with the state filing requirements.

FACTUAL AND PROCEDURAL BACKGROUND

On March 2, 1984, an involuntary Chapter 7 petition was filed against Meacham-Brown Center, a Utah limited partnership. The petition was not controverted and on May 7, 1984 an order for relief was entered. Roger G. Segal was appointed trustee of the debtor's estate on May 7, 1984.

On November 16, 1984, the trustee commenced this adversary proceeding to avoid an alleged transfer of $150,000 to the defendant, based upon averments that such transfer constituted a preference and/or a fraudulent conveyance avoidable under Sections 547, 548 and 550 of the Bankruptcy Code.

On January 25, 1985, the defendant filed a motion to dismiss the adversary proceeding. The defendant contends (1) that the adversary proceeding must be brought in the debtor's name, as the real party in interest, and (2) the debtor has no capacity to sue under Utah law for failing to file with the Secretary of State a certificate setting forth the name under which it was doing

business. The matter was heard by the Court on March 1, 1985, and taken under advisement.

The Court has considered the memoranda filed by the parties together with the file in this case and the statements and arguments of counsel, and upon its own review of the applicable statutes, rules and case authorities renders its decision as follows.

DISCUSSION

The Real Party in Interest Rule

The defendant argues that Rule 17(b), Fed.R.Civ.P., as made applicable to this adversary proceeding by Bankruptcy Rule 7017, provides that the capacity of the trustee to sue is determined by state law governing the capacity of the debtor entity to sue or be sued.[1] According to defendant's argument, since the debtor is the real party in interest, and since Section 42-2-10 precludes the debtor from bringing suit, the trustee may not assert these claims. The trustee's response is that Section 42-2-10 is not applicable because (1) the trustee did not "carry on, conduct, or transact" the debtor's business, and (2) that section applies only to proceedings commenced in "courts of this state," *i.e.*, state courts. Rule 17(b) provides:

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See Memorandum of Points and Authorities in Support of Defendant Andrea Bennett's Motion to Dismiss, at 2.

> <u>Capacity to Sue or be Sued</u>. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

It is undisputed that Meacham Brown Center, a limited partnership, was not formed in accordance with the Utah Limited Partnership Act, Utah Code Ann. §§ 48-2-1 <u>et seq</u>. (Repl. 1981). Nor did the debtor file a certificate pursuant to Utah Code Ann. § 42-2-5 (Repl. 1981) setting forth the name under which it conducted business and the names of the persons carrying on the business.[2] The penalty for noncompliance with the

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Section 42-2-5 provides:

> Certificate of assumed and of true name -- Contents -- Execution -- Filing. Every person or persons who shall carry on, conduct or transact business in this state under an assumed name, whether such business be carried on, conducted or transacted as an individual, association, partnership, corporation or otherwise, shall file in the office of the secretary of state a

certification requirement is set forth in Utah Code Ann. § 42-2-10 (Repl. 1981), as follows:

> Penalties. Any person or persons who shall carry on, conduct or transact any such business under an assumed name without having complied with the provisions of this act shall not sue, prosecute or maintain any action, suit, counterclaim, cross complaint or proceeding in any of the courts of this state until the provisions of this chapter have been complied with.

The purpose for assumed name statutes, such as Utah's, is to provide information about persons and entities doing business under assumed names in order that members of the public may know the identity of those with whom they do business. See Photo & Sound Company v. Corvallis, 628 P.2d 733, 735 (Ore. 1981).

Rule 17(a), Fed.R.Civ.P., requires that every civil action be prosecuted in the name of the real party in interest. The real party in interest is the one who has the legal right to bring the action. Boeing Airplane Company v. Perry, 322 F.2d

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> certificate setting forth the name under which such business is, or is to be carried on, conducted or transacted, and the full true name, or names, of the person or persons owning, and the person or persons carrying on, conducting or transacting such business, the location of the principal place of business and the post-office address, or addresses of such person or persons. Such certificate shall be executed by the person or persons owning, and the person or persons carrying on, conducting or transacting such business, and shall be filed not later than thirty days after the time of commencing to carry on, conduct or transact said business.

589, 591 (10th Cir. 1963). The real party in interest rule is designed to insure that the party bringing the action has a sufficient interest in the proceeding to diligently advance the litigation.

The trustee has the capacity to sue to recover preferences and fraudulent conveyances in his own name and representative capacity for the benefit of the debtor's estate and its creditors. 11 U.S.C. §§ 323, 551.[3] The avoidance powers under the Bankruptcy Code are intended for the benefit of the debtor's creditors, and are held in trust by the debtor in possession or trustee for their benefit. In re J.E. Jennings, Inc., 12 B.C.D. 905, 906 (Bkrtcy. E.D. Pa. 1985). The power to avoid these transfers of the debtor's property is vested in the trustee as representative of the debtor's estate, see 11 U.S.C. §§ 547, 548, and in the debtor in possession when the debtor in possession assumes the trustee's functions. See 11 U.S.C. § 1107(a).

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The law of preferences and fraudulent conveyances is a part of the substantive law of bankruptcy.

> These provisions provide the creditors of a bankrupt estate, acting through the trustee in bankruptcy, with the rights and powers necessary to insure that actions by the bankrupt debtor or by aggressive creditors in the immediate prebankruptcy period do not thwart one of the fundamental purposes of the bankruptcy laws, to provide a fair and equal distribution of a bankrupt's assets.

R. Levin, "An Introduction to the Trustee's Avoiding Powers," 53 Am. Bankr. L.J. 173 (1979).

Section 323 and Bankruptcy Rule 6009 plainly authorize the trustee to commence an adversary proceeding to determine whether certain transfers may be avoided and recovered for the benefit of the estate. Therefore, in actions commenced under the trustee's avoiding powers, the trustee, not the debtor, _is_ the real party in interest.

Trustee As Creditors' Representative

The second aspect of defendant's argument is conceptually quite similar to the first. Simply stated, it is that since the trustee stands in the shoes of the debtor, the trustee enjoys no greater rights than the debtor against whom failure to comply with the assumed name statute is an absolute defense. This position is unsound.

This Court has held that in the exercise of his avoiding powers, the trustee acts on behalf of creditors and enjoys greater rights than the pre-petition debtor.

> The filing of a bankruptcy petition creates certain rights which the trustee may assert, regardless of whether such rights were possessed by the debtor prior to filing. In some respects, it is useful to think of a Chapter 11 debtor as a new entity, with its own rights and duties distinct from those of the pre-bankruptcy company.
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> Generally, it is true that a trustee's rights under Section 541 are derivative from the rights of the debtor. _See In re Great Plains Western Ranch Company, Inc._, 38 B.R. 899, 11 B.C.D. 894, 897 (Bkrtcy. C.D. Cal. 1984).

> However, it is a mistake to assume that this is a definitive delimitation of the trustee's powers. As to fraudulent conveyances and preferences, the trustee has the rights of a judgment creditor as well as the powers specifically conferred by the bankruptcy law. Dudley v. Easton, 104 U.S. (14 Otto) 99, 103, 26 L.Ed. 668 (1881). When exercising his avoiding powers the trustee is not asserting a cause of action belonging to the debtor, but is acting in a representative capacity on behalf of all the creditors. Fairbanks Shovel Co. v. Wills, 240 U.S. 642, 648, 36 S.Ct. 466, 468, 60 L.Ed. 841 (1916); In re Onondaga Litholite Co., 218 F.2d 671, 674, 50 A.L.R.2d 308 (2nd Cir. 1955); In re McDonald, 173 F. 99, 102 (D. Mass. 1908); In re Best Pack Seafoods, Inc., 29 B.R. 23, 24, (Bkrtcy. D. Me. 1983). In the exercise of such powers, the trustee enjoys greater rights than the pre-petition debtor. See e.g., In re Leasing Consultants, Inc., 592 F.2d 103, 110 (2d Cir. 1979) (the trustee stands not only in the shoes of the debtor -- he fits as well into the "overshoes" of its creditors; when exercising his avoiding powers the trustee is not limited to the rights of the debtor); G. Glenn, "Creditor's Rights -- A Review of Recent Developments," 32 Va.L.Rev. 235, 252 (1956).

In re Independent Clearing House Co., 41 B.R. 985, 998-99 (Bkrtcy. D. Utah 1984). See also Kindom Uranium Corporation v. Vance, 269 F.2d 104, 106 (10th Cir. 1959) (the rights of the trustee under his avoiding powers are not derived from and limited by those of the debtor existing at the date of bank-ruptcy); 2 COLLIER ON BANKRUPTCY ¶ 323.02[b][4], at 323-9 (15th ed. 1984). Cf. McGovern v. Kraus, 227 N.W. 300, 67 A.L.R. 1381, 1389 (Wis. 1929) (a bankruptcy trustee has greater rights in some

instances, particularly as to transactions in fraud of creditors, than the debtor himself would have).

DECISION AND ORDER

Upon entry of the order for relief, the bankruptcy trustee is invested with a variety of powers under federal law to avoid various pre-petition transfers of the debtor's property. At that time the debtor ceases to be the real party in interest and is replaced in that capacity by the trustee as the representative of all creditors. The trustee derives his authority to avoid certain transactions of the debtor not from the debtor itself, but from the Bankruptcy Code, and he exercises them on behalf of and in the interest of creditors. The defense of the pre-petition debtor's incapacity to sue under state law, arising out of its failure to file a certificate of doing business under an assumed name with the Secretary of State, has no application in an action commenced by the bankruptcy trustee under his statutory avoiding powers.

Therefore, based on the foregoing, IT IS HEREBY ORDERED that defendant's motion to dismiss the above-entitled adversary proceeding be, and the same hereby is, denied.

DATED this 2 day of May, 1985.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE