

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

In re:

Case Number:

RONALD C. COLBETH
ELIZABETH L. COLBETH,
d/b/a Top Crop Service,

EF7-82-02144

Debtors.

PETER F. HERRELL, Trustee
of Ronald C. Colbeth and
Elizabeth L. Colbeth,

Plaintiff,

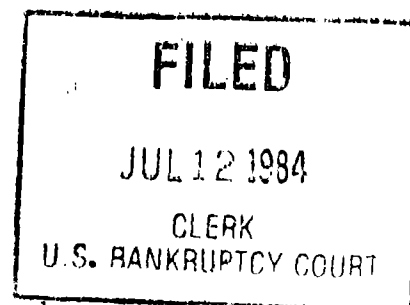
Adversary Number:

vs.

83-0235-7

OTTAWA, STRONG & STRONG, INC.,

Defendant.



FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND
ORDERS (1) DECLARING A PREFERENCE and
(2) FOR AN ACCOUNTING AND TURNOVER

Trustee Peter F. Herrell having filed a Complaint to determine a preference under 11 U.S.C. section 547(b)(1982); and the defendant, Ottawa, Strong & Strong, Inc., by its attorney, Robert W. Mudge of Gilbert, Mudge and Porter, having filed an Answer; and the parties having agreed to have the matter decided upon submission of their briefs; and the Court having considered the submitted briefs and reviewed the file herein, and being fully advised in the premises, FINDS THAT:

1. The parties have agreed to the following stipulated facts:

1. That the debtors herein filed a petition for relief pursuant to Chapter 7 of the Bankruptcy Code on December 8, 1982.

2. That Peter F. Herrell is the duly appointed and acting trustee in this matter as of December 8, 1982.

3. That on June 24, 1982, the debtor, Ronald Colbeth, executed a promissory note in favor of plaintiff in the amount of Ninety-one Thousand, Eight Hundred forty-eight and 00/100 (\$91,848.00) Dollars. . .

4. That on August 30, 1982, the debtors executed a note in the amount of One Hundred Two Thousand, Four Hundred Fifty-six and 06/100 (\$102,456.06) Dollars. . .

5. That on or after June 24, 1982, the debtors executed a document in which Ottawa, Strong & Strong claim gives them security in "all presently owned equipment, fixtures, inventory of raw materials, returned repossessed goods and accounts receivable."

6. That plaintiff filed with the Secretary of State a financing statement which showed the debtor as "Top Crop Service." That the plaintiff did not file a financing statement with the Secretary of State which showed the debtor as either Ronald C. or Elizabeth L. Colbeth.

7. That on October 29, 1982, an action [was] commenced in Circuit Court for St. Croix County, Wisconsin, and the plaintiff [obtained a judgment of] replevin against the debtors and strictly seized items. . . which included inventory, equipment and accounts receivable.

8. That as of November 10, 1983, of the assets replevied above, approximately Five Thousand and 00/100 (\$5,000.00) Dollars has been reduced to cash with the balance unliquidated as of yet.

9. . . .a report of the Secretary of State regarding the financing statements filed against Ronald C. Colbeth. . . indicates that no financing statements are filed.

2. The financing statements and the promissory notes between the Colbeths and Ottawa, Strong & Strong contain no language granting a security interest to Ottawa, Strong & Strong, Inc.

3. The Trustee argued that the defendant, Ottawa, Strong & Strong, Inc. [hereinafter O.S.S.] , was unsecured and therefore the replevin constituted a voidable preference under 11 U.S.C. sec. 547(1982).

4. O.S.S. joined issue regarding its secured status.

5. The secured status of O.S.S. is a question of Wisconsin law. See In re Ellsworth, 28 B.R. 13, 15 (Bankr.9th Cir. 1983).

6. To be a secured creditor O.S.S. must have a valid security interest in the alleged collateral.

7. Under Wis. Stat. sec. 409.203(1)(1982) a security interest does not attach and is unenforceable unless:

(a) The collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; and

(b) Value has been given; and

(c) The debtor has rights in the collateral.

8. In Barth Brothers v. Billings, 68 Wis.2d 80, 227 N.W.2d 673 (Sup. 1975) the Supreme Court of Wisconsin held that a financing statement and a promissory note do not create a valid security interest, there must be granting language.¹

9. Even a financing statement and a promissory note containing language to the effect that the note was secured by certain collateral is not enough to create a security interest. In re Don Miller, Inc., 35 B.R. 714, 716 (Bankr.E.D.Wis. 1984).

10. O.S.S. does not have a security interest in the replevied assets because there is no document that can serve as a security agreement.

11. Since O.S.S. does not have a security interest in the replevied assets the transfer of the assets constitutes a voidable preference under 11 U.S.C. sec. 547.

12. Because O.S.S. does not have a security interest this

¹ Barth Bros. v. Billings refers to Wis. Stats. sec. 409.204 regarding the requirements necessary for a security interest to attach, this part of sec. 409.204 was moved to sec. 409.203 in 1973.

Court need not decide the issue of whether filing a financing statement under the trade name "Top Crop Service" was sufficient to perfect any security interest O.S.S. may have had.

CONCLUSION OF LAW

The replevin by O.S.S. is a voidable preference under 11 U.S.C. 547 (1982).

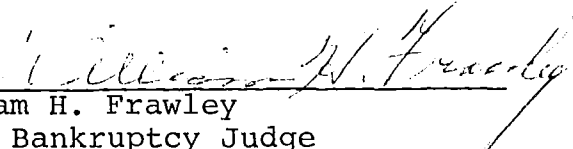
ORDER

IT IS ORDERED THAT said replevin constitutes a voidable preference under 11 U.S.C. sec. 547.

IT IS FURTHER ORDERED THAT O.S.S. account for and turn over to the Trustee the replevied assets in its possession or the value thereof.

Dated: July 12, 1984.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge