Not for Publication

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

IN RE:

DONALD CLAUDE ROBINSON, Chapter 7

Debtor Case No. 96-10069

JOHN R. CANNEY III, TRUSTEE,

Plaintiff

v.

RICHARD, GATES, HOFFMAN AND CLAY, INC.,
TEMPLE PLUMBING,
LEADER HOME CENTER,
DERRIG EXCAVATING,
SANDRA SELLERS,

Defendants

U.S. BKRPTCY CRT
DISTRICT OF VT
JAN 21 2000
FILED BY
KATHLEEN A. MURRAY

Adversary Proceeding

No. 99-1048 #24-1 #25-1

APPEARANCES:

John R. Canney III, Esq., P.O. Box 6626, Rutland, VT 05702-6626
Counsel for Trustee-Plaintiff

Donald S. Harry, Esq., P.O. Box 234, Wilmington, VT 05363,
Counsel for Richard, Gates, Hoffman and Clay, Inc., Defendant

Christopher S. Dugan, Esq., MARK L. ZWICKER, P.C.,
P.O. Box 2455, Brattleboro, VT 05303, Counsel for Leader Home Center, Defendant

Timothy J. O'Connor, Jr., Esq., 40 Western Avenue, Brattleboro, VT, 05301-0532, Counsel for Temple Plumbing, Derrig Excavating and Sandra Sellers, Defendants

MEMORANDUM OF DECISION
ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

AO 72A
(Rev.8/82)

KRECHEVSKY, U.S.B.J.

I.

John R. Canney III, the trustee of the Chapter 7 Estate of Donald Claude Robinson ("the plaintiff"), on July 28, 1999, filed a complaint against the five named defendants asserting that he, as trustee, had sent dividend checks to each of the five defendants; that the defendants had cashed such checks; that the defendants had "received more than the amount to which they were entitled"; that he had requested that the defendants return such funds to him and that the defendants have refused to do so.

All five defendants filed like answers generally stating that they were without sufficient knowledge to answer the averments of the complaint as to why the dividends should be returned. The plaintiff, on November 22, 1999, filed a motion for summary judgment together with a memorandum of law and a "Statement of Material Facts" (" the Statement"). In pertinent part, the Statement asserts:

> "4. The amounts tendered to Defendants were in excess of their true entitlement as the priority creditors, I.R.S. and Vermont Department of Taxes, were not first paid.
>
> 5. The Plaintiff demanded the return of the funds so that he could pay the priority creditors and recalculate the dividend for the unsecured creditors."

The plaintiff did not support his allegations by affidavit or any other form of proof.[1]

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[1] Although not referred to in the complaint or in the motion papers, Bankruptcy Code § 549(a) provides that a "trustee may avoid a transfer of property of the estate -- (l) made after the commencement of the case; and (2) ... (B) that is not authorized under this title or by the court."

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All five defendants again filed similar responses to the summary judgment motion, including "Statements of Disputed Facts" and "Counter-Statements of Material Facts," the gist of which denies paragraph 4 of the Statement "for lack of information," and denies that the plaintiff is entitled to a return of the funds.

II.

Except where pleadings present only a question of law, Fed. R. Civ. P. 56(c), made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7056, contemplates that a movant for summary judgment will submit "pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits" to show there is no genuine issue for trial and entitlement to the granting of the motion. When supporting affidavits are submitted, then, pursuant to Rule 56(e), "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading...." Inasmuch as the plaintiff has submitted with his motion neither affidavits nor any other supporting materials, the court, despite the defendants' mere denials, is precluded from granting the motion for summary judgment.

III.

The plaintiff's motion for summary judgment must be, and hereby is, denied, and the clerk of the court is requested to schedule the adversary proceeding for immediate trial. It is

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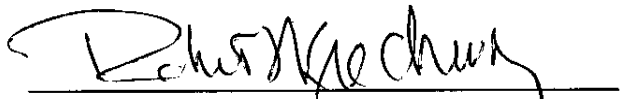
SO ORDERED.

Dated at Hartford, Connecticut, this 26 day of January, 2000.



ROBERT L. KRECHEVSKY
UNITED STATES BANKRUPTCY JUDGE

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