

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS

In Re)
) In Bankruptcy
WENDELL C. BRUCE,)
) Case No. 97-41148
 Debtor.)
-----)
MICHELLE VIEIRA, Trustee,)
)
 Plaintiff,)
)
 v.) Adversary No. 98-4033
)
WENDELL C. BRUCE,)
MIKE VICKERY and)
DIANA L. VICKERY,)
)
 Defendants.)

O P I N I O N

On April 13, 1998, Plaintiff Michelle Vieira ("Plaintiff"), the Chapter 7 Trustee for the above-captioned bankruptcy case, filed a complaint to avoid an allegedly fraudulent transfer of property to the Defendants, Mike and Diana Vickery. The three count complaint alleged that, within one year of the filing of the bankruptcy petition, the Vickerys had purchased three funeral homes from Wendell C. Bruce ("Debtor"), and that Debtor did not receive reasonably equivalent value in said transaction. Specifically, Trustee alleges that the Vickerys paid \$70,000 for real estate and personal property which was worth more than twice that amount.

Plaintiff sought turnover of the property or payment of its fair market value.

From the time the adversary proceeding was filed until a trial was held on November 9, 1998, all of the pretrial matters were handled by Judge Kenneth Meyers in whose Court the adversary proceeding had been filed. The file indicates that the Vickerys' attorney was slow in responding to discovery requests made by Plaintiff. A motion to compel response to discovery was filed by Plaintiff's counsel on October 22, 1998. That motion contained numerous allegations regarding the conduct of the Vickerys' attorney. On November 2, 1998, Judge Meyers held a hearing on Plaintiff's motion to compel. On the same date, Judge Meyers entered an order compelling a response to discovery requests and requiring the Vickerys to answer certain interrogatories, requests for production, and for their attorney to file an entry of appearance. On November 3, 1998, the Court held a telephone conference and ordered that the Vickerys produce certain tax returns. At that time, the Vickerys' attorney advised that all other discovery had been mailed to Plaintiff's counsel. There is no indication in the record that any request for continuance was made by any party. When the matter was called for trial on November 9, 1998, before a visiting judge, Plaintiff filed a motion for sanctions. That

motion complains of numerous procedural deficiencies in the discovery requests, including allegations that not all documents which were required to be produced were actually produced, that the answers to interrogatories were in improper form, that four individuals were disclosed on November 4, 1998, as possible expert witness, and that such disclosure was untimely. At trial, Plaintiff asked that the Vickerys' attorney not be allowed to call Mr. Whetstone, Mr. Bragee, Mr. Edwards, or Mr. Ninker as expert witnesses and that he not be allowed to introduce into evidence any documents not previously produced. Plaintiff's counsel also asked for attorneys fees.

The motion for sanctions does not request that the trial be continued. In fact, it is the Court's recollection that, upon the Court's inquiry, both parties expressed a desire to go forward with the trial on November 9, 1998. The Court expressly noted that the motions to compel production and for sanctions could have been filed in a more timely manner. The record shows that Plaintiff had the opportunity and did take the deposition of the Vickerys and that Plaintiff's counsel knew the names of the four witnesses who were proposed. The District Court on remand stated that it was unclear what the Court's ruling was on the motion for sanctions. The Court's ruling, based upon the above-enumerated facts, was that the motion for sanctions should

be denied as to all matters except the testimony of Mr. Whetstone and Mr. Bragee and the Court reserved a determination as to those witnesses at the time they might be tendered.

During the trial, the Court did not, to its knowledge, admit any document into evidence which had not been previously furnished to Plaintiff's counsel prior to trial. Moreover, the Defendants did not tender, and the Court did not admit, either Mr. Bragee or Mr. Whetstone, as an expert witness. Rather, the Court allowed Mr. Bragee to testify as to his personal involvement with the transaction at issue and his advice to his clients. The Court allowed his testimony and received it as simply coming from a Certified Public Accountant who had advised his clients as to what he felt was a reasonable offer to purchase the business from Debtor. He gave his clients his opinion based upon accounting principles and his examination of the cash flow which was being generated by Debtor.

Mr. Whetstone, the president of the bank which had made the loans in this matter, testified as to the basis for the bank's decision that it could only lend the Vickerys \$70,000 on this business. Mr. Whetstone testified that the bank only loaned the Debtor \$70,000 when he purchased the business from Mr. Edwards, the previous owner. That decision, Mr. Whetstone testified, was

based upon the cash flow generated by the business when it was owned by Mr. Edwards. During Debtor's tenure in the business, the cash flow decreased somewhat. When the Vickerys proposed to purchase the business from Debtor, the bank determined that it could lend the Vickerys no more than \$70,000 (the bank eventually loaned the Vickerys \$80,000, but required them to put up their residence as collateral). Mr. Whetstone testified that this decision was based on the cash flow that had been generated by Debtor while he was running the business.

This testimony from an accountant and from a banker was straightforward, non-expert testimony related to their firsthand knowledge and involvement with the transaction at issue. Mr. Sharp, the Plaintiff's attorney, had adequate opportunities and did cross-examine these witnesses. In his cross-examination, Mr. Sharp clearly made the point that neither witness had any background in the funeral business, nor had either bought or sold a funeral business, nor were either offering an appraisal of the property. It was clear that both witness' testimony was offered to show the cash flow of the funeral business at issue. Under these circumstances, the Court could find no prejudice to the Plaintiff.

In her case in chief, Plaintiff tendered two expert witnesses who were allowed to testify. Unfortunately, the Court

found both of the Plaintiff Is experts' testimony to be somewhat unreliable and not entitled to a great deal of weight. As value was the crux of

this case, the Court based its decision upon what it thought was the best basis for valuing the business - the cash flow.

Because the Court felt that Plaintiff was not prejudiced by the testimony of Mr. Whetstone or Mr. Bragee, the Court did not find it appropriate to strike their testimony or grant any other sanctions.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

ENTERED: October 16, 2000

/s/ LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
WENDELL C. BRUCE)
)
Debtor.) BK No. 97-41148
)
MICHELLE VIEIRA, TRUSTEE)
In Bankruptcy)
)
Plaintiff,)
)
vs.)
)
WENDELL C. BRUCE and) ADV. No. 98-4033
MIKE VICKERY & DIANA L.)
VICKERY,)
)
Defendants.)

JUDGMENT ORDER

This cause comes on the Complaint of the Plaintiff, Michelle Vieira, Trustee in Bankruptcy of the Debtor, Wendell C. Bruce and the Answer of the Defendants, Michael Vickery and Diana L. Vickery. This Court has received evidence and arguments of counsel at trial. The Court Finds:

1. That the Court has jurisdiction over this proceeding.
2. That the Debtor, Wendell C. Bruce, acquired certain funeral homes over a period of two years from William Edwards. In the last few years said homes had been operated by Mr. Edwards, then leased to Gaskins Funeral Homes, then managed by Mr. Bruce, then purchased by Mr. Bruce.

3. Mr. Bruce does not appear to be a knowledgeable purchaser or businessman. Mr. Bruce's testimony was that he did not bargain over the purchase price of the Funeral Homes but simply gave the amount Mr. Edwards requested and did not know what was actually purchased, in that there was no inventory taken or list of what was being bought, nor did Mr. Bruce look at any financial information or records concerning the business prior to the purchase. While under Mr. Bruce's ownership business dropped to less than One Thousand Dollars (\$1,000.00) per month being earned.

4. Mr. Bruce borrowed Seventy Thousand Dollars (\$70,000.00) from the National Bank of Carmi which was the maximum they would loan for the purchase of the business based upon the cash flows of the business and its value per Mr. Jim Whetstone, President and CEO of the National Bank of Carmi, who also testified that the loan was in trouble from beginning and additional operating funds of \$5,000.00 were required to keep business going.

5. A Mr. Tony Cox, testified that he at one time prior to the sale to Mr. Bruce, had offered to purchase the business from Mr. Edwards, and that Mr. Edwards would let him know, however he never contacted Mr. Edwards again nor did he look at any financial information or take an inventory or appraisal of the business. Mr. Cox is a competitor of Mr. Vickery and stated that

he was interested in buying the business but would need to look at the business again to see what was gone before offering an amount for the home as he thought a computer and hearse were gone from the business.

6. A Mr. Gary Hicks testified about values for the Funeral Homes based on formulas that he has used in the past in buying Funeral Homes for a Kentucky corporation. Mr. Hicks stated he had not examined the financial records of the homes in question and that there were several factors that could effect the formulas used and their results.

7. A Mr. Kevin W Bragee, CPA, testified that he had done a financial analysis of the business in 1994 before the business had gone through a down turn in business and several changes in management and stated the value to be between \$75,000.00 and \$100,000.00.

8. Mr. Mike Vickery testified that he had borrowed \$75,000.00 to purchase the Funeral business and he had borrowed an additional \$10,000.00 to repair and improve the business. These loans were obtained from the National Bank of Carmi which required additional collateral to be furnished for the loan, that being a house owned by Mr. Vickery.

Wherefore, **IT IS THE JUDGMENT OF THIS COURT THAT:**

1. Defendants, Michael Vickery and Diana L. Vickery, paid

a reasonably equivalent value for the real estate and personal property of the Funeral Homes purchased from the Debtor, Wendell C. Bruce.

2. Plaintiff's, Michelle Vieira, Trustee in Bankruptcy of Debtor, Wendell C. Bruce, Complaint to Avoid Fraudulent Transfer of Property is denied.

DATED: APRIL 15, 1999

/s/ LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE