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Subject:06-01142-s Doc#: 12 Montoya v. Skyway Trading Company, Inc.

-- Order on Motion For Summary Judgment

Content-Type: text/plain

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U.S. BANKRUPTCY COURT

New Mexico

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Order Denying Defendant's Motion For Summary Judgment and/or to Dismiss (Related Doc # [9]) (jeb)

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW MEXICO

In re:

HUSAM ALIBWEH,  
Debtor.

No. 7-05-18120 S

PHILIP J. MONTOYA, TRUSTEE,  
Plaintiff,

v.

Adv. No. 06-1142 S

SKYWAY TRADING COMPANY, INC.,  
Defendant.

**ORDER DENYING DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT AND/OR TO DISMISS**

This matter is before the Court on Defendant's Motion for Summary Judgment and/or to Dismiss (doc 9), Plaintiff's Response (doc 10) and Defendant's Reply (doc 11). The Court finds that there are genuine issues of material fact that prevent entry of summary judgment. The Court also finds that the Complaint in this case, on its face, states a claim for relief such that dismissal would not be appropriate. The Court has subject matter and personal jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b); this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F); and these are findings of fact and conclusions of law as required by Rule 7052 F.R.B.P. This chapter 7 case was filed prior to the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-08, 119 Stat. 23, and therefore the changes enacted by that legislation are not applicable to this case.

**FINDINGS OF FACT**<sup>1</sup>

Debtor and his brother owned, respectively, 80% and 20% of First Natives of This Land, Inc. ("First Natives"), a New Mexico corporation incorporated on May 15, 1998. First Natives did business with Skyway Trading Company, Inc. ("Defendant"), which is in the business of manufacturing, selling and consigning for resale jewelry on a wholesale and retail basis. Skyway denies ever transacting business with Debtor individually.

On July 17, 2003, the New Mexico State Public Regulation Commission revoked First Natives' certificate of incorporation<sup>2</sup>. Despite the revocation, First Natives purported to continue in business until July, 2005. Defendant believes it consigned jewelry to First Natives during 2004 and 2005. Plaintiff believes that, as a matter of law, the jewelry was consigned to Debtor individually because First Natives certificate had been revoked. In general, the business agreement between Defendant and First Natives was that Skyway would provide jewelry owned by

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<sup>1</sup>Although formal findings of fact and conclusions of law are not necessary in a summary judgment decision, see Fed.R.Civ.P. 52(a), the Court will take this opportunity to state the facts as it perceives them at this stage. This should assist the parties in an eventual trial of this case. Furthermore, the "Facts" found herein are not intended to be binding at trial; rather, they should be treated as preliminary proposed facts.

<sup>2</sup>Documents relating to this revocation are not in the file. The Court cannot determine if the revocation was for failure to appoint or maintain a registered agent, see N.M. Stat. Ann. § 53-11-12, or for some other reason.

Skyway, on consignment, to First Natives, and that after each trade show, a portion of the proceeds would immediately be paid to Defendant as compensation for the sold consigned jewelry. Another portion of the proceeds would be given to First Natives to pay overhead, including trade show fees, travel and taxes.

In July, 2005, Defendant claims it had consigned approximately \$300,000 of jewelry to First Natives at retail cost. Plaintiff disputes the consignment was to First Natives, and also disputes that the jewelry was valued at retail. On or about July 5 or 6, 2005, the consigned jewelry was returned to Defendant. Exhibit C to the Motion for Summary Judgment is a marginally legible "Sales contrac" that states:

I Sam Abweh is selling all my assets + jewelry + artifacts + all inventory plus all the showcases + fixtures + goodwill from First Native of this Land to Mohammed Qurashi of Skyway for the consideration of the amount owed to Skyway for \$521904.18. M.Q. will be the sole owner for all the asset as of 7/5/05. M.Q. is buying the right for all the shows that listed below done by First native of this Land + Sam Abweh.

The signature is unreadable, and does not specify that it was signed in any sort of corporate capacity. There is no list attached to the Exhibit.

On September 23, 2005, Debtor filed a voluntary Chapter 7 proceeding and Plaintiff was appointed Trustee. Debtor's petition lists as an other names used "fdbba First Natives of this Land, Inc." and "Sam Abweh" and lists both the last 4 digits of his social security number and the entire EIN for First Natives.

The Statement of Financial Affairs, Question 18 states "Debtor is an individual: Business First Natives of this Land, Inc."

Plaintiff filed this adversary proceeding against Defendant to recover the returned consigned jewelry or its value as a preferential transfer. Plaintiff alleges, but Defendant denies, that First Natives was merely a d/b/a of the Debtor, and that Defendant consigned the jewelry to Debtor without obtaining a security agreement or filing a financing statement.

Despite the affidavits attached to the Motion for Summary Judgment, the Court finds a genuine issue of fact as to whom the jewelry was consigned. Because the identity of the consignee is so crucial to this case, the Court finds that the Motion for Summary Judgment should be denied.

The Court will also take this opportunity to address other issues that should be brought out at trial or in future motions or briefs.

1. If First Natives' certificate were revoked pursuant to N.M. Stat. Ann. § 53-11-12, is it relevant that the consigned jewelry was returned within the two year grace period anticipated by § 53-11-12(B) during which actions taken by the corporation are deemed retroactive to the date of revocation by § 53-11-12(D)?
2. Was First Natives insolvent on the date the consigned jewelry was returned?

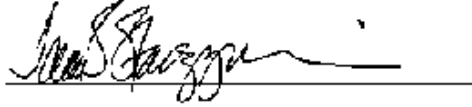
3. If First Natives were insolvent, did common law duties arise that subjected Debtor and/or his brother to fiduciary duties on behalf of First Natives' creditors? Alternatively, were there any statutory duties imposed that subjected them to fiduciary duties?
4. Would treating the consigned jewelry as belonging to Debtor constitute an impermissible preference to Debtor under Smith v. Cox, 113 N.M. 682, 684-85, 831 P.2d 981, 983-84 (1992)?
5. Under what theory can Debtor's creditors attach the assets of First Natives? Could Debtor's brother's creditors also attach the same assets? How should priority be determined?
6. Did both Debtor and his brother actively participate in the business after the certificate of revocation? See Mallinqa v. Harvey Family Medical Center, 293 Ill.App.3d 1001, 1005, 688 N.E.2d 816, 819-20 (1997)(Administrative dissolution creates partnership)
7. Did Debtor and his brother share profits and losses from the business after the certificate of revocation?
8. Is Trustee attempting to pierce the corporate veil? If so, no facts have been alleged at this point to enable the Court to do so. See Slone v. Brennan (In re Fisher), 2007 WL 295465 (S.D. Ohio 2007)(Trustee could pierce debtor's corporation's veil and treat transfer of inventory as a fraudulent transfer of the debtor.)

9. Are either Debtor's brother or First Natives necessary parties in this action?
10. Is administrative revocation of a certificate of incorporation that same thing as dissolution? If not, how is it different? See Scott Graphics, Inc. v. Mahaney, 89 N.M. 208, 212, 549 P.2d 623, 627 (Ct. App. 1976):
- Statutory conditions to the right to engage in business, to be performed after the corporation has been formed, are conditions subsequent, and while a non-compliance therewith may give the state a right to proceed to forfeit the franchise, such non-compliance in the absence of such proceeding does not in anywise affect the legal existence of the corporation.
- (Quoting Skarda v. Commissioner of Internal Revenue, 250 F.2d 429, 435 (10<sup>th</sup> Cir. 1957)(Construing prior Business Corporation Act, but "equally applicable to our present act.")(Quotation marks omitted.)) See also, e.g., Astral Electric Co., Inc. v. Bob Wells Constr. Co., Inc., 538 N.E.2d 986, 989-90 (Ind. App. 1989).
11. What happens to the assets of an administratively revoked corporation? Is the two year reinstatement period relevant to this determination (see § 53-11-12)? Similarly, what happens to the assets of a dissolved corporation, or is there a presumption that by the time of dissolution all liabilities have been satisfied and all property distributed to shareholders (see § 53-16-11)?

12. Did the State Corporation Commission certify to the attorney general the name of First Natives as being eligible for dissolution pursuant to N.M. Stat. Ann. § 53-16-14?
13. Did the state, through the office of the attorney general, file a suit for involuntary dissolution of First Natives pursuant to N.M. Stat. Ann. § 53-16-13?
14. If no involuntary dissolution proceeding was filed, does the Plaintiff lack standing to challenge the corporate capacity of First Natives, given the strictures of N.M. Stat. Ann. § 53-11-6? See Bank v. Allen, 35 A.D.2d 245, 247, 315 N.Y.S.2d 323, 325 (Ct. App. 1970)(No standing); compare Ethanair Corp. v, Thompson, 252 Neb. 245, 249, 561 N.W.2d 225, 228 (1997)(A private party may collaterally attack the legal stature of a corporation if it has been "dissolved" and retains neither de jure nor de facto existence.)
15. Can an administratively dissolved corporation be a corporation de facto? See Ethanair, 252 Neb. at 251, 561 N.W.2d at 229 (Recognizing possibility.)
16. The Court is unconvinced that corporation by estoppel should apply to this case. While the Debtor and Defendant may both be estopped from denying the corporate existence, the Trustee should not be.
17. Was the return of the consigned jewelry an act that could be considered as part of "winding up" First Natives?



**IT IS ORDERED** that Defendant's Motion for Summary Judgment and/or to Dismiss (doc 9) is denied.



Honorable James S. Starzynski  
United States Bankruptcy Judge

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