

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

No. 01-17271
Chapter 7

NORTH AMERICAN ROYALTIES, INC.
Debtor

DOUGLAS R. JOHNSON, TRUSTEE

Plaintiff

v

Adversary Proceeding
No. 03-1375

SAMSON INDUSTRIAL CORPORATION

Defendant

MEMORANDUM

The bankruptcy trustee filed this action against the defendant to recover alleged preferential transfers. 11 U.S.C. § 547. The defendant's answer included the defense that the trustee's complaint fails to state a claim upon which relief can be granted. Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b). The trustee has filed a motion to strike the defense. A motion to strike can be used to remove an insufficient defense from an answer. Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(f); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1381.

The defense raises the question of whether the facts alleged in the complaint – not the actual facts – would give the plaintiff a claim against the defendant. For the purpose of ruling on the defense, the court assumes the truth of the facts alleged in the complaint and the inferences fairly drawn from the alleged facts. The court then decides whether, based on those

facts and inferences, the law provides the plaintiff with any enforceable claim against the defendant. *United Food and Commercial Workers International Union Local 199 v. United Food and Commercial Workers International Union*, 301 F.3d 468 (6th Cir. 2002).

When this defense is stated in an answer, the defendant must prove it like any other defense. The only facts to be proved are the statements in the complaint, but this does not mean the court will rule on the defense on the basis of the complaint and answer without any additional action by the defendant. The court will usually wait for the defendant to seek a decision by filing a motion or some other pleading. If the court decides not to wait, it will alert the parties that it intends to make a decision and give them time to make their arguments before the court renders a decision. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 at 300-301; *Schorn v. Larose*, 829 F.Supp. 215, 217 (E. D. Mich. 1993). If neither the defendant nor the court brings the defense up for a decision before trial, the plaintiff can do so by filing a motion to strike. That is the point of the trustee's motion to strike in this proceeding. He is asking the court to deal with the defense now instead of later.

Dealing with the defense now may be a waste of effort for the parties and the court. Why should the court rule on the defense now when the defendant has not done anything to bring it up for a pre-trial ruling? Indeed, the defendant may have put the defense in the answer, instead of a motion to dismiss, as a method of preserving the defense without requiring anyone to work on it immediately. Delaying a decision will allow the parties to refine the issues and sort out the facts so that the defendant can determine whether the defense should be pursued. Delay will also allow the plaintiff time to discover and correct defects in the complaint, if necessary. Furthermore, many of the trustee's preferential transfer complaints in this bankruptcy case have been settled, and the court expects that many more will be settled. Forcing the parties to argue the defense at

this point may produce attorney's fee charges but not bring about any meaningful progress in this adversary proceeding. For these reasons, the court will impose a procedure that should be more efficient. Within the time for filing dispositive motions, the defendant may file a motion or other pleading asking the court to rule on the defense, but if the defendant fails to do so, the court will grant the motion to strike. The court will enter an order accordingly.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P. 7052*.

ENTER:

BY THE COURT

[Entered 06-24-2004]

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE