UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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In re:

RONALD J. BEYERSTEDT, ORDER DENYING CROSS-MOTIONS FOR SUMMARY JUDGMENT

Debtor.

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MICHAEL S. DIETZ, Trustee, BKY 3-91-6007

Plaintiff, ADV 3-92-98

v.

TOWN & COUNTRY STATE BANK OF WINONA,

Defendant.

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At St. Paul, Minnesota, this _____ day of December, 1993.

This adversary proceeding came on before the Court on January 20, 1993, for hearing on the parties' cross-motions for summary judgment. The Defendant appeared by its attorney, Cindy K. Telstad. The Plaintiff appeared on behalf of the bankruptcy estate. Upon the moving and responsive documents, the arguments of counsel, and the other files and records in this adversary proceeding, the Court denies both motions.

NATURE OF PROCEEDING

The Debtor, a resident of Winona, Minnesota, filed a voluntary petition for relief under Chapter 7 on November 4, 1991. Prior to his bankruptcy filing, he was the sole shareholder in Standard Foundry Company, Inc. ("Standard Foundry") a Minnesota corporation. The Plaintiff is the trustee of the Debtor's bankrputcy estate. The Defendant is a financial institution that did business with the Debtor and Standard Foundry for a number of years. On or about September 16, 1991, the Defendant received approximately $68,000.00 from the proceeds of the sale of the equipment of the metal foundry in which Standard Foundry had carried on its business. In some of the documents for the sale, both the Debtor and Standard Foundry were named as the sellers.

Through this adversary proceeding, the Plaintiff seeks to have the transfer of the sale proceeds to the Defendant declared a preferential transfer within the contemplation of 11 U.S.C. Section 54(b), and avoided pursuant to that statute. Pursuant to 11 U.S.C. Secctin 550(a), he requests a money judgment against the Defendant to effectuate that avoidance.

In its answer to the Plaintiff's complaint, the Defendant specifically denies that the sale proceeds had been property of the Debtor. the Defendant also pleads, as an affirmative defense, that

> if property of the [D]ebtor was transferred to [the D]efendant, [the D]efendant was a transferee for value, in good faith, and without knowledge of the voidability of the transfer sought to be avoided.

Defendant's answer, at Paragraph5 (filed on May 18, 1992).

MOTIONS AT BAR

Both parties have moved for summary judgment pursuant to FED. R. BANKR. P. 7056.(FN1)

The Defendant served and filed its motion first. In it, the Defendant follows the lead of Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986): it argues that the Plaintiff cannot prove one of the essential elements of his cause of action--the transfer of an interest of the Debtor in property--so it is entitled to judgment in its favor in the context of the present motion.(FN2)

Acknowledging that his request is "based upon essentially the facts advanced by [Defendant] in connection with its motion," the Plaintiff made a responsive motion for summary judgment in favor of the bankruptcy estate. Essentially, he argues that the Defendant is barred from attacking the fact element in question, by one or both of two legal doctrines he invokes. Then, he posits, uncontroverted evidence, entitling him to judgment "as a matter of law."

UNDISPUTED FACTS

Many of the relevant documentary and transactional facts are established without contest in the deposition testimony of several witnesses, and in exhibits from those depositions.

For some sixteen years before 1981, the Debtor had been employed in various capacities in the trade of metal casting and foundry work. In January, 1981, he purchased all of the outstanding shares of stock in Standard Foundry. Before the Debtor's acquisition, Standard Foundry owned the Winona real estate on which its production facility was located, as well as the buildings and the equipment associated with its operations. On December 15, 1981, Standard Foundry conveyed its real estate to the Debtor, and the Debtor then leased it back to Standard Foundry.

Over the next several years, Standard Foundry and the Debtor made various repairs and additions to the production facility. They financed these improvements through Norwest Bank Southeast N.A. ("Norwest"), which took a mortgage against the real estate and security interests against equipment and other personalty to secure repayment of the indebtedness. Apparently, Norwest gave two or more loans, one of which was secured by personalty alone. Norwest required the Debtor to submit personal financial statements as a part of the applications for these loans. The personal financial statements that the Debtor submitted to Norwest during years 1986 through 1988 contained line-entries for

a number of items of foundry equipment that Standard Foundry was using in its operations. Neither party disputes that the Debtor owned these items in his own right during the periods for which he gave these financial statements.

In the spring of 1989, Standard Foundry and the Debtor obtained a loan from the Defendant, in the principal amount of $96,050.00. They used the proceeds to pay off the loan from Norwest that had been secured by equipment and other personalty. The "Combined Note and Security Agreement" evidencing this loan is dated May 12, 1989. On its heading, it recites the "Borrower's Name" as "Standard Foundary [sic] Company, Inc." It recites that the borrower was granting the Defendant a security interest in

> [a]ll inventory, fixtures, equipment, contract rights, accounts and general intangibles now owned or hereafter acquired by Standard Foundary [sic] Company, Inc., where located[,] to include but not limited to Schedule A.

The Debtor, designated as the president of Standard Foundry, signed it under the heading that read "Borrower's Signature." Without this official title, he signed it again under the headings entitled "Guarantor's Signature,"(FN3) and "Owner of the Security."(FN4)

The Defendant apparently filed a financing statement or statements to perfect the security interests it took under this transaction, but it listed only Standard Foundry as the named debtor on the face of the statement(s). In any event, the Defendant never filed a financing statement that noted the Debtor as the debtor, in either the office of the Winona County Recorder or that of the Secretary of State of Minnesota.

On September 30, 1989, the Debtor, as president of Standard Foundry, authorized and directed the making of several entries on the Debtor's general journal. The first pair of entries added certain enumerated equipment, valued at a total of $66,850.00, to Standard Foundry's "Depreciation Schedule--Machinery & Equipment."(FN5) In a corresponding entry in Standard Foundry's running account for "Machinery & Equipment," the value of $66,850.00 was added to the existing total.

In the second pair of entries, Standard Foundry's expense account for "Officer Salary" paid or payable to the Debtor was reduced by the sum of $64,746.91, and a credit in the sum of $2,103.09 was made to Standard Foundry's liabilities account for "Notes Payable--Officer." The balance outstanding for the "Officer Salary" expense account before these entries represented cash that Standard Foundry had paid to the Debtor during 1989, net of payments attributable to the lease of the premises from him.

The parties have produced no other documentary evidence relating to the events of September 30, 1989, other than a brief entry from Standard Foundry's corporate records, entitled "Informal Action Taken by the Shareholders of Standard Foundry Company, Inc. Pursant [sic] to Minnesota Statues [sic]," and dated October 28, 1989. This states:

> The undersigned being owners and holders of the outstanding stock of Standard Foundry Company, Inc. consent to the action taken bt [sic] the corporation as recorded below;
>
> Approve all the acts, deeds and proceedings done and taken by the directors and officers of the corporation for andon [sic] its behalf during the preceeding [sic] year as the same

> appear from the books and records of the corporation. [sic]
>
> Appoint the same directors as in effect as this past year.

During 1991, Standard Foundry experienced financial difficulty. The Internal Revenue Service ("the IRS") assessed a substantial tax claim against Standard Foundry, apparently for unpaid employee withholding taxes, and asserted and perfected statutory liens against its assets. In the fall of 1991, Norwest foreclosed on its mortgage against the real estate in which the company carried on operations. The Debtor then undertook to sell the equipment and other personalty associated with the business. He found a buyer, negotiated a sale, entered into a "Purchase and Sale Agreement," and obtained the consent of the IRS to the disposition. The Purchase and Sale Agreement, dated September 11, 1991, gave the Debtor and Standard Foundry the collective designation of "the Seller." The Debtor signed it twice, once under a designation as Standard Foundry's President and once without.

By a bill of sale dated September 16, 1991, a large spread of enumerated production equipment and other personalty was conveyed to A.R. Waldorf and Midwest Metal Products, Inc. (collectively "Midwest Metal"). This bill of sale is on a preprinted form, on which most of the blanks are completed by typewriting. The Debtor's own name is typewritten in in the line identifying the grantor, and under the signature line. Immediately prior to the typewriting of the Debtor's name, "Standard Foundry Company, Inc." is handwritten; immediately after the typewriting for his name, "President" and "Pres" variously are handwritten. Mark Merchlewitz, the attorney representing Midwest Metal for the transaction, made the handwritten additions at the closing, before the Debtor signed the bill of sale.

Midwest Metal paid a total of $95,000.00 for the equipment and other personalty. From the proceeds of sale, the IRS was paid $27,051.14, and the Defendant was paid $67,948.86. This disposition had been specified in the "Purchase and Sale Agreement."

DISCUSSION

I. STANDARDS FOR SUMMARY JUDGMENT

The threshold inquiry on any motion for summary judgment is whether there is a "genuine issue as to any material fact." Fed. R. Civ. P. 56(c). In passing on this question, the courts must identify the factual elements of the claims or defenses that are at issue in the motion. They then must evaluate the evidence brought forward for the motion in light of those elements, and in light of the status of the moving and responding parties as to the claims or defenses at issue.

A defendant-movant may move for summary judgment in its favor on the plaintiff's claim(s), by pointing out that the extant evidence cannot support a finding in the plaintiff's favor on one or more of the essential elements of the plaintiff's case. Celotex Corp. v. Catrett, 477 U.S. at 325; City of Mt. Pleasant v. Assoc. Electric Coop., Inc., 838 F.2d 268, 273-274 (8th Cir. 1988). Such a "preemptive strike" imposes a responsive burden of production on the plaintiff, which avoids a grant of summary judgment for the defendant only by producing evidence that would support findings in its favor on the element(s) in question. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-252 (1986); Firemen's Fund Ins. Co.

v. Thien, ___ F.3d ___,___, No. 93-1815, slip op. at 4-5 (8th Cir. November 8, 1993); Heideman v. PFL, Inc., 904 F.2d 1262, 1265 (8th Cir. 1990). This countering evidence must be "significant" and "probative," Johnson v. Enron Corp., 906 F.2d 1234, 1237 (8th Cir. 1990), as well as "substantial," Krause v. Perryman, 827 F.2d 347, 350 (8th Cir. 1987). If it is, the record manifests a triable fact issue on the element(s) in question, and the defendant's motion must be denied. If it is not, the court must find the facts as urged by the defendant, and hold in the defendant's favor as to the plaintiff's claim(s).

On a plaintiff's motion for summary judgment, the process must be described somewhat differently, though the underlying thought is identical. The plaintiff may "point out," Celotex Corp. v. Catrett, 477 U.S. at 325, that all of the evidence generated by investigation and discovery supports the factual theory of its own case, and that the defendant's factual theory has no support in the record. To avoid a grant of judgment in favor of the plaintiff, the defendant must produce significant, probative, and substantial evidence that denies the existence of one or more elements of the plaintiff's cause of action, or that constitute the basis for a recognized affirmative defense.

II. THE DEFENDANT'S MOTION

The defendant's motion for summary judgment implicates only one of the elements of 11 U.S.C. Section 547(b)(FN6): whether its receipt of the proceeds of the sale of equipment and other personalty was, or included, a "transfer of an interest of the debtor in property." As the Defendant would have it, on September 30, 1989, the Debtor divested himself of all of the equipment on the Standard Foundry premises that he had previously owned, in favor of Standard Foundry;(FN7) then, when the personalty was sold, the proceeds were in no way subject to claims by or through the Debtor.

The Plaintiff does not challenge the existence of the documentary evidence going to the events of September 30, 1989. As the very fundament of his cause of action, however, he maintains that they did not work a valid and final transfer of ownership from the Debtor to Standard Foundry. Basically, he says that the transaction was a sham. The Defendant, of course, denies this, pointing to the entries on Standard Foundry's books and records as evidence that it was effected. The gist of the Defendant's present motion is that the Plaintiff has no evidence to back his contention that no transfer took place, and that all of the extant evidence indicates that it did.

The issue of whether a sale under such circumstances is a sham is a question of fact. First Bank v. Pope, 141 B.R. 115, 118 (E.D. Tex. 1992); In re Girard, 104 B.R. 817 , 821 (Bankr. W.D. Tex. 1989). Colloquially stated, the issue is whether the 1989 transaction was "a pretended sale or a real sale." First Bank v. Pope, 141 B.R. at 118. If it was "real," of course, all of the equipment reposed in Standard Foundry's ownership immediately before the sale to Midwest Metals, subject to the Defendant's perfected security interest, and the bankruptcy estate of the Debtor suffered no loss or diminution when the Defendant took its share of the proceeds.(FN8) If it was "pretended," the ownership of at least the equipment that was purportedly subject to the September 30, 1989 transfer remained with the Debtor through the date of the sale to Midwest Metals, and the Defendant's receipt of all or some portion of(FN9) the proceeds is actionable as a preference.

Opening the issue this way, the Defendant arguably carried its burden of production as movant; it proffered the portions of Standard Foundry's books and records referring to the September 30, 1989 transaction, and then asserted that there was no evidence to support any direct finding or inference that the ownership of the equipment had not passed as the book entries suggested. This, of course, shifted the burden of production over to the Plaintiff.

The Plaintiff, in turn, has carried his burden, through evidence as to a number of aspects of the situation that would support findings in his favor. When deposed, the Debtor admitted that he and Standard Foundry never executed a contract of sale before the events of September 30, 1989, and that he never signed a bill of sale or other instrument to evidence and effect the purported transfer. Arguably, Standard Foundry's purchase from the Debtor was outside the ordinary course of its business; it was a transaction with an insider that involved value representing a large proportion of its asset structure. However, there was no formal action by the corporation's shareholders or board to authorize the transaction. To the extent that recognition and action by the corporation was called for, it came only via the generalized, post-hoc ratification in the October, 1989 "Informal Action." To the extent that the documents involved in the 1991 sale to Midwest Metals recite ownership, they are inconsistent; the Debtor signed the purchase and sale agreement in dual capacities, as individual and as Standard Foundry's President, but he purported to execute the bill of sale in only the status of a corporate officer. In deposition, he admitted that, throughout the course of the sale to Midwest Metals, he did not himself know who owned the equipment in question.

Finally, and most trenchantly, the September 30, 1989 entries on Standard Foundry's books can best described as "creative accounting." In the first place, the corporation's account for "Officers Salary" contains a number of entries for cash payments to the Debtor, apparently entered throughout 1989. The nature of these entries strongly suggests that the underlying disbursements were in the nature of true salary, made on an ongoing basis to compensate the Debtor for his services to the company. In deposition, however, the Debtor testified that the company had made these payments to compensate him for his transfer of the equipment and other personalty, purportedly as recapitulated by the September 30, 1989 entries. The content of this statement is totally inconsistent with the experience between the company and the Debtor for the several preceding years; from 1986 through 1988, cash payments to the Debtor were debited to the "Officers Salary" account, and, at the company's September 30th fiscal year-end, this and the company's other expense accounts were closed out, presumably to retained earnings.

In accounting terms, the end result of the line-entries for September 30, 1989, was the capitalization of entries previously characterized as expenses, to reflect a purported purchase of equipment from the Debtor rather than the past payment of salary to the Debtor. No funds, in cash or check, exchanged hands in connection with the attributed sale. The net formal result was that the Debtor was never compensated for his services to the Debtor during fiscal year 1989, because a payable entry for the now-capitalized sum was not then created on the Debtor's books.(FN10) Standard Foundry's balance sheet, augmented by the value of the equipment and other personalty, became more positive, and

its pre-tax income, as reflected on its books, increased by more than $64,000.00.

Since the Debtor never executed a bill of sale for the September, 1989 transaction, there is no direct evidence bearing on the validity and finality of his transfer to Standard Foundry. In its totality, the evidence just summarized is substantial, significant, and probative; however, it is equally susceptible to two competing inferences on the element in question, one in favor of the Defendant and in favor of the Plaintiff, and both entirely reasonable. As such, a grant of summary judgment is inappropriate. Anderson v. Liberty Lobby, Inc., 477 U.S. at 250 ("the drawing of legitimate inferences from the facts" is the function of the finder of fact after trial, not of the court reviewing a motion for summary judgment, if the evidence would support more than one such inference); In re Mathern, 137 B.R. 311, 322 (Bankr. D. Minn. 1992), aff'd, 141 B.R. 667 (D. Minn. 1992). The Defendant's motion must be denied.

III. THE PLAINTIFF'S MOTION

In his responsive motion, the Plaintiff argues that the bankruptcy estate is entitled to judgment "as a matter of law" for the relief it requests in its complaint. After making this broad request, however, the Plaintiff focuses on the same, single issue of fact identified by the Defendant, and makes two alternative arguments. In the first the Plaintiff posits that none of the extrinsic evidence surrounding the September, 1989 transaction is material, because the lack of a signed, written contract of sale bars the Defendant from interposing the transfer to Standard Foundry as part of its defense to the complaint. In the second, the Plaintiff maintains that the September 30, 1989 transfer cannot be given legal effect because it "was not supported by consideration."

A. Statute of Frauds

The Defendant does not contest that the Debtor and Standard Foundry never executed a written contract of sale or bill of sale for the 1989 transaction. As a result, the Plaintiff's first argument presents a question of law. Starry Construction Co., Inc. v. Murphy Oil USA, Inc, 785 F. Supp. 1356, 1361 (D. Minn. 1992). See also Jerry Harmon Motors, Inc. v. First Nat'l Bank & Trust Co., 472 N.W.2d 748, 753 (N.D. 1991).

The Plaintiff invokes the statute of frauds provision of the Minnesota enactment of Article 2 of the Uniform Commercial Code, Minn. Stat. Section 336.2-201(1).(FN11) The Defendant responds

The first is a technical ground. The Plaintiff failed to plead the statute of frauds as one of the underpinning of his theory of recovery within the four corners of his complaint, or in any pleading responsive to the Defendant's answer. As a result, Fed. R. Bankr. P. 7008(FN12) prohibits him from raising it as a theory

to counter any claim or defense of the Defendant. In re Denmark Co., Inc., 73 B.R. 325, 327 (Bankr. S.D. Fla. 1987). See also Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210, 1215 (6th Cir. 1987) (failure to raise statute of frauds as affirmative defense/response amounts to waiver thereof).

Second, as a matter of substance, the Plaintiff's invocation of the doctrine is inapposite. In general, only parties to a contract may invoke the statute of frauds, in litigation directly involving that contract. Parkside Mobile Estates v. Lee, 270 N.W.2d 758, 762 n. 4 (Minn. 1978); Formanek v. Langton, 134 N.W.2d 883, 886 (Minn. 1965). See, in general, 17 B Dunnell Minn. Dig. 2d Statute of Frauds Section 5.10 (3d ed. 1984). The very

wording of the statute, referencing "the party against whom enforcement is sought . . ." (emphasis added), contemplates its use only where the contract is the very basis for the relief to be accorded in the litigation, and where the contract remains unperformed by the party against whom that relief is to be ordered. As counsel for the Defendant appropriately notes, the statute really is a "shield," or affirmative defense; it cannot be wielded as a "sword" by a person who is not a party to the contract, or in litigation in which no party seeks relief by way of direct enforcement of the contract. The framers of Article 2 clearly did not contemplate the invocation of its statute of frauds in the present setting.(FN13)

B. Lack of Consideration

Referring to the evidence brought forward on this motion, the Plaintiff argues that the September, 1989 transaction cannot be given legal force and effect because Standard Foundry did not give consideration to the Debtor contemporaneously with the transfer. For, basically, the same reasons that defeat the Defendant's motion, the Plaintiff cannot obtain summary judgment on this ground. The evidence going to the bona fides of the transaction--whether or not true value was exchanged when Standard Foundry purportedly took ownership of the personalty, and how much--cuts toward several conflicting possible findings, this fact issue simply cannot be resolved on the documentary evidence at bar. The record presents a genuine issue of material fact on this point, which must be held over to trial.

C. Other Reasons for Denying the Plaintiff's Motion

There are several other reasons why the Plaintiff's motion cannot be granted on the present state of the evidentiary record and the development of legal argument.

First, even though he maintains he is entitled to judgment without trial, the Plaintiff has put no specific evidence going to any of the other elements of Section 547(b) into the record for these motions. To be sure, the proof of record might be held to satisfy Sections 547(b)(1) - (3); too, under Section 547(f) the Plaintiff has the benefit of a presumption in his favor on Section 547(b)(4). He has failed to adduce anything going to the "advancement-in-position" element of Section 547(b)(5), however.

Second, even assuming a lack of triable fact issues, and findings uniformly in the Plaintiff's favor, there is still confusion as to just how the law entitles him to judgment. In dwelling on the fact that the Defendant never perfected its security interest under the Debtor's own name, the Plaintiff seems to be maintaining a right to some sort of relief under the trustee's "strongarm" powers granted by 11 U.S.C. Section 544(a). However, he has never pleaded this statutory theory, nor explicitly argued it. If, in fact, provisions of the Combined Note and Security Agreement and quoted supra at nn. 3 and 4 interacted to effect a grant of security for the Debtor's individual guaranty, the Plaintiff would have to invoke Section 544 to defeat or subordinate the Defendant's secured rights.(FN14) Further complicating this inquiry is the fact that the "Owner of Security" provision recites that the signatory has no personal liability on the underlying debt.

The Plaintiff has just not adequately clarified this aspect of his theory of recovery, which might well be a central component of his claim to relief. As a result, he has not shown that he is entitled to judgment under the governing law.

ORDER

On the basis of the foregoing memorandum, then,

IT IS HEREBY ORDERED:

1. That the Defendant's motion for summary judgment is denied.

2. That the Plaintiff's cross-motion for summary judgment is denied.

BY THE COURT:

_____

GREGORY F. KISHEL
U.S. BANKRUPTCY JUDGE

(FN1) This rule makes FED. R. CIV. P. 56 appicable to adversary proceeding in bankruptcy. In pertinent part, FED. R. CIV. P. 56(c) provides that, upon a motion for summary judgment,

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits [submitted in support of the motion], if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(FN2)Anticipating that the Plaintiff would maintain in the alternative that he could use the theory of "reverse piercing of the corporate veil" to charge the sale proceeds as property of the Debtor, the Defendant's counsel also argued that the Trustee could not prove the requisites for this remedy under Minnesota law. Since the Plaintiff has not raised this theory, at least for the present motion, this argument need not be addressed.

(2FN3The language of the document between this heading and the Debtor's signature is:

> The person signing here is the guarantor. The bank may require the guarantor to pay the loan at any time after it becomes due, whether or not the bank has then made any effort to collect the loan from the borrower or co-borrower. The guarantor will continue to be responsible even if the bank releases its security interest in property described above, consents to changes in this agreement, or releases any other person from responsibility. The guarantor must also pay any attorneys' fees and other costs of enforcing this guaranty. By signing, the guarantor takes on serious responsibilities. These responsibilities are summarized in the "Notice to Guarantor" on the back of this form. By signing here, the guarantor confirms that he or she has read that notice.

(F43)The language of the document between this heading and the Debtor's

signature is:

The person signing here owns an interest in the property described above. By signing, he or she joins in granting the bank a security interest in the property. The owner is not personally responsible for payment of the loan.

(FN5)As identified in the addition to the schedule, this equipment and its value was:

Elect. Furnaces & Power Supply		$34,000.
Sandbelt, 12 Powered		750.
Wheelabrator Dust Cover	4,000.	
Roger 18" Belt Aireator	1,600.	
Dependable Shell Core Machine	3,000.	
Transite Blow Boards		600.
Alum. Flasks		
20 x 20	1,200.	
24 x 24	1,200.	
18 x 28	1,200.	
20 x 32	1,200.	
20 x 24	1,200.	
Temp. Recorder	1,000.	
Portable Temp. Indicator		400.
B&P 60 Muller	9,500.	
Simpson #1 Muller	6,000.	
	$66,850.	

(FN6) The relevant text of this statute is:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

(1)to or for the benefit of a creditor'

(2)for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3)made while the debtor was insolvent;

(4)made--

(A)on or within 90 days before the date of the filing of the petition; [and]

. . . .

See also In re Interior Wood Products Co., 986 F.2d 228, 230 (8th Cir. 1993); Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 497 (8th Cir. 1991); Brown v. First Nat'l Bank of Little Rock, 748 F.2d 490, 491 (8th Cir. 1984).

(FN7)There, presumably, the Defendant's security interest attached to these assets upon receipt, under color of the after-acquired property provision in the security agreement.

(FN8)The Eighth Circuit has identified a diminution or depletion of assets that otherwise would have gone into the bankruptcy estate, as a necessary characteristic of a preferential transfer. Brown v. First Nat'l Bank of Little Rock, 748 F.2d at 491 (citing DeAngio v. DeAngio, 554 F.2d 863, 864 (8th Cir. 1977) (decided under Bankruptcy Act of 1898)).

(FN90)In his coFN9plaint and his pleadings for this motion, the Plaintiff summarily demanded judgment for the full amount of sale proceeds that the Defendant received . In her reply memorandum, however, the Defendant's counsel makes a significant point as to the true amount of value involved in the alleged preference. If one compares the Debtor's 1986-88 financial statements and the documents relating to the September 1989 transfer, against the list of items attached to the September 1991 bill of sale, one sees that Midwest Metal received many more items from the Debtor than Standard Foundry had from the Debtor two years earlier. The clear inference is that some significant fraction of the sale proceeds is traceable to equipment owned by Standard Foundry, properly subject to the Defendant's security interest, and not subject to the Plaintiff's claim of a sham sale. Even if the Plaintiff's theory is valid, then, he may well not be entitled to recover all of the sale proceeds that the Defendant received. The issue of the allocation of the purchase price is one of fact, and probably is rather involved; given the outcome of these motions, the parties must be prepared to address it at trial.

(FN10)Other facts that may bear on this issue are whether Standard Foundry issued a W-2 form to the Debtor for wages paid in 1989, and for how much; and whether the Debtor declared the receipt of income from Standard Foundry on his 1989 personal tax returns, and how much. There is no evidence in the record going to either of these points.

(FN11)In pertinent part, this statute provides as follows:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought. . .

(FN12)This rule generally incorporates Fed. R. Civ. P. 8. Fed. R. Civ. P. 8(c) provides, in pertinent part that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . [the] statute of frauds . . . "

(FN13)To be sure, the Court in Denmark Co. took cognizance of the availability of the defense to a trustee in bankruptcy, even if it appeared to conclude that the technical rules of pleading barred the trustee there from arguing it. However, in that case the oral agreement in question ran between the debtor and the defendant, and was asserted by the defendant in defense to the trustee's preference action. Here, the Debtor was indeed a party, but the other party

was a stranger to this litigation.

(FN14)If it did not, of course, the Plaintiff's repeated references to perfection are irrelevant; if the Defendant did receive value from the Debtor individually, it did so as an unsecured creditor fully vulnerable to preference attack.