

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 13-10529)
)
ZACHARIA DUANE BOLEN)
BETHANI LeERIN HINDENLANG-BOLEN)
)
Debtors)
)
)
DUSTIN ROACH, TRUSTEE)
)
Plaintiff)
)
vs.)
)
STEVEN E. BARCUS, KARI J. ROMNEY,)
and DOUGLAS P. ROMNEY)
)
Defendants)

NOT INTENDED FOR PUBLICATION

PROC. NO. 14-1123

DECISION

On March 28, 2016.

This case founders on the shoals of damages. The plaintiff/trustee contends the defendants failed to disclose material facts necessary to correct misleading information previously given to the debtors in connection with their purchase of the stock of Espresso Gallery, Inc. from the defendant, Steven E. Barcus, the defendant Kari Romey’s father.¹ This action seeks to recover for that claimed violation of Indiana securities laws.² See, I.C. 23-19-5-1(2), 23-19-5-9. In the event of such a

¹Because the case fails on damages, the court does not need to determine whether there was a failure to disclose material facts, I.C. 23-19-5-1(2), or whether proper tender was made by the plaintiff. See, I.C. 23-19-5-9(a)(2), 23-19-5-10.

²The claim constitutes property of the Bolens’ bankruptcy estate, see, 11 U.S.C. § 541, and is being prosecuted by the trustee for the benefit of creditors. The outcome of the litigation will have an impact upon the size of the bankruptcy estate available for distribution to creditors and is therefore related to a case under Title 11, giving the court jurisdiction over it. See, 28 U.S.C.

violation, “the purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, . . . upon tender of the security . . .” I.C. 23-19-5-9(a)(1). This remedy is essentially rescissory. The buyer returns what it received from the seller and gets back what it gave. Here, the only consideration the debtors gave their seller was the promise to pay the agreed upon purchase price in installments, their guaranty and assumption of various corporate obligations, and the promise to hold the defendants harmless from them.³ The only payments actually made to anyone were made by the corporation to third parties – such as Bank of America, Instant Whip, Theta Ridge, and other corporate payables – on account of its own obligations; payments that would have had to be made regardless of who owned the company’s stock. Yet, those payments are what the trustee seeks to recover from the defendants in this action “because of the [debtors’] own infusions of cash [into the business] and more than a year of unpaid labor.” Plaintiff’s Post-Trial Brief, pg. 18. But, the corporation’s obligation to make those payments did not depend upon the sale agreement and would not be eliminated if that agreement is rescinded. They are not recoverable under I.C. 23-19-5-9(a)(1) and judgment will be entered for the defendants.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court

§ 1334(b). All parties have consented to the bankruptcy judge hearing and determining this matter and entering final judgment thereon, see, 28 U.S.C. § 157(c)(2), the defendants having done so in open court.

³The plaintiff’s argument is that the debtors agreed to pay \$350,000 for the security. That is not so. They agreed to pay \$200,000 for the security – the stock in Express Gallery, Inc. – a company burdened by \$150,000 in debt. The plaintiff’s argument essentially requires the court to disregard all distinctions between the various companies, their shareholders and the agreements in question.