UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

BAGEL BROS BAKERY & DELI, INC. Case No. 98-11441

Debtor

In re

R&J HOLDINGS OF BUFFALO, INC. Case No. 98-11442

Debtor

In re

BAGEL BROTHERS MAPLE, INC. Case No. 98-11443

Debtor

This has been a particularly well-argued case on both sides. If this is not obvious from the fact that there has been a reversal of a trial court's decision, it is clear in the advocacy on remand.

The Ohio Farmers' claim is disallowed for the reasons set forth in the District Court's decision of March 7, 2002 and the arguments set forth in the Debtor's "Memorandum of Law on Remand in Support of its Objections to Ohio Farmers' Claim."

This Court adds only this point: Ohio Farmers is distressed by the fact that the "meticulous" bookkeeping previously found by this Court was not based on evidence introduced at the Ohio Farmers hearing. This is such a key finding vis-a-vis traditional veil-piercing analysis (which this writer thought was not relevant here), how could the Court reach that

conclusion without taking evidence on that point at hearing on the Ohio Farmers claim? Indeed, Ohio Farmers apparently did not seek discovery on that point and consequently would have had no way of knowing whether "back-office" activities were or were not faithful to the separateness of the corporate entities. But under Rule 3007 Fed. R. Bankr. P., an objection to a claim like this one is not an "Adversary Proceeding." Rather, it is a "Contested Matter," and is a "core proceeding" under 28 U.S.C. § 157(b)(2)(B). In this writer's view, each core proceeding in a Chapter 11 case that was heavily-litigated here is not a *tabula rasa*. If Congress and the Rules (which are promulgated by the U.S. Supreme Court and approved by Congress under 28 U.S.C. § 2075) have erred in permitting a bankruptcy judge to consider what he has learned about a debtor in other vigorously-contested proceedings, then the concept of 28 U.S.C. § 157 as applied by Rule 7001 Fed. R. Bankr. P., would fall. Every proceeding would have to be a plenary proceeding in which the court would not be permitted to take judicial notice of what it already ruled upon as to a debtor's business or financial affairs. (As an unrelated example, a court would not be able to order "adequate protection" payments based on the court's knowledge of the debtor's cash flow, but rather would have to direct discovery, and take evidence, in each instance).

Most importantly, the burden was on Ohio Farmers to establish a basis upon which Maple was liable.[1] Ohio Farmers offered no evidence to demonstrate that corporate

[1] Although a "proof of claim executed and filed in accordance with these rules shall constitute *prima facie* evidence of the validity and amount of the claim" (Fed. R. Bankr. P. 3001 (f)) that presumption was rebutted as soon as the Debtor demonstrated that Ohio Farmers did not ever deliver product to Maple and never billed Maple until Maple became a Chapter 11 debtor.

formalities were not observed, except as to certain communications to Ohio Farmers. This writer previously believed those representations to have been enough to render Maple liable (and previously believed that this was premised on a theory distinct from "piercing the corporate veil" because Maple was a part of a larger enterprise that was not incorporated). This Court previously believed that the *Walkovsky* case (*Walkovsky v. Carlton*, 18 N.Y. 2d 414 (1966)) specifically permitted a finding that if the "larger" corporate "enterprise" was not in fact incorporated, then each of the subordinate entities are liable because the principles are "agents" of a larger *de facto* entity that they chose not to incorporate. The higher court's ruling in this case teaches otherwise, and the Ohio Farmers claim must fall.

SO ORDERED.

Dated: Buffalo, New York
May 24, 2002

/s/ Michael J. Kaplan

Hon. Michael J. Kaplan, U.S.B.J.