

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF RHODE ISLAND

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In re: :

FORTE BROTHERS, INC. : BK No. 97-10071  
Debtor Chapter 7

ANDREW S. RICHARDSON, TRUSTEE of :  
FORTE BROTHERS, INC., a/k/a :  
TODESCA CORPORATION :  
Plaintiff :

5. : A.P. No. 01-1011

NEW ENGLAND BITUMINOUS CORPORATION,;  
TODESCA EQUIPMENT CO., INC.,  
ANGELO TODESCA CORPORATION, and :  
ALBERT TODESCA  
Defendants :

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**ORDER DENYING TRUSTEE’S MOTION FOR TEMPORARY RESTRAINING ORDER**

Heard on February 6, 2001, on the Trustee’s Motion for Temporary Restraining Order against the Defendants in the above captioned adversary proceeding. The Trustee’s argument centers on an “Advice of Credit” in the amount of \$1,960,364 which was issued in the Debtor’s name by Bank Boston, and credited to an account (allegedly clandestinely) held by New England Bituminous Corporation. See Exhibit B. It is undisputed that the account number is that of the Defendant, New England Bituminous Corporation (hereinafter “NEB”), and that NEB’s account was credited with the funds in question. It is also undisputed that as soon as the funds came into the possession of NEB, it was automatically swept and deposited into the account of one of the other Defendants. The Trustee argues that the Debtor’s name on the “Advice of

Credit” constitutes a property right in the \$1.9 million, and that when NEB accepted and appropriated the money to its own use, post-petition and without notice to the Trustee, it violated the automatic stay and should be ordered to restore the funds to the Debtor. The Trustee also seeks a temporary restraining order, enjoining the Defendants from transferring *any* of its assets until the entire \$1.9 million is restored to the Estate.

This Court cannot rule on the Trustee’s motion in a vacuum, looking only to the “Advice of Credit,” nor am I confident that the Advice of Credit, standing alone, creates rights in the Debtor sufficient to support the issuance of a TRO, where the Plaintiff has a heavy burden.

The \$1.9 million at issue here represents the proceeds from the sale of assets that once were property of the Debtor, i.e., in March 1994 the Debtor sold certain real estate and other equipment used in an asphalt operation to NEB for \$2,340,000. The Trustee contends that NEB never paid for the assets it received, and has pending in the United States District Court for the District of Rhode Island a fraudulent transfer action against NEB and the other Defendants. In July 1998, NEB sold these assets to an unrelated third party for \$2,650,000 and NEB netted \$1.9 million from the sale, which is evidenced by the Advice of Credit upon which the Debtor’s name appears as payee.

This Court has held previously that a trustee’s fraudulent conveyance action is property of the estate and that, as such, property which is the subject of the litigation should be protected. *See McGowan v. Ciccone (In re Ciccone)*, 171 B.R. 4, 5 (Bankr. D.R.I. 1994). Similarly, in the instant case, the Trustee alleges that the funds represent proceeds from the Debtor’s assets which were transferred without consideration to NEB. In his new adversary proceeding, however, the Trustee focuses only on the Advice

of Credit, and not the fraudulent conveyance action pending in District Court. In the present procedural posture, I must conclude, reluctantly, that the two matters, i.e., the Trustee's Adversary Proceeding No. 01-1011 and the fraudulent conveyance action, are too inextricably intertwined to be considered separately, and because a major part of the litigation is pending before the District Court, the Motion for a Temporary Restraining Order is DENIED here, without prejudice to the Trustee raising the issue in the District Court litigation.

Dated at Providence, Rhode Island, this 14<sup>th</sup> day of February, 2001.

/s/ Arthur N. Votolato  
Arthur N. Votolato  
U.S. Bankruptcy Judge