

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
H & N TRUCKING, INC., ) CASE NO. BK96-80748  
)  
DEBTOR ) A96-8124  
\_\_\_\_\_)  
H & N TRUCKING, INC., )  
) CH. 7  
Plaintiff )  
vs. )  
)  
LESLIE HARNETT, an Individual )  
and ASSOCIATES COMMERCIAL CORP., )  
a Corporation, )  
)  
Defendant )

MEMORANDUM

Hearing was held on March 19, 1997, on Motion for Intervention filed by O'Daniel Oldsmobile, Inc., and Motion to Compromise Controversy with Leslie Harnett. Appearances: James Napier for the debtor, Robert Becker for the trustee, David Koukol for Associates, Mark Novotny for O'Daniel Oldsmobile and John Kocourek for Leslie Harnett. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(E).

**Background**

The debtor, H&N Trucking, and O'Daniel Oldsmobile, Inc., d/b/a O'Daniel Executive Leasing (O'Daniel), entered into a lease agreement in June 1995 for a tractor and trailer. The lease called for a 1995 Kenworth model W900 tractor with the serial number 1XKWDB9XXSS681371 and a 1995 Great Dane Trailer with the serial number 1GRAA9629SW099101. According to O'Daniel, it provided cash for the debtor to purchase the tractor and trailer from Leslie Harnett in the name of O'Daniel and then the debtor was to lease the equipment back from O'Daniel. There is evidence that O'Daniel gave the debtor a check dated June 8, 1995 for \$145,500, with \$96,000 allocated to the tractor and \$49,500 allocated for the

trailer. There is, however, no evidence of a written contract between O'Daniel and the debtor or O'Daniel and Harnett for this transaction.

The debtor and Harnett had a business relationship whereby the debtor would arrange for shipments that would be picked up and delivered by Harnett. The debtor would pay Harnett for the cost of trucking less a commission for itself. The debtor terminated this business relationship by a letter dated July 5, 1995.

Harnett claims he bought the tractor and trailer in April 1995. Associates Commercial Corporation (Associates) held a first lien on the tractor in the amount of \$73,900.55, and by virtue of its lien, had physical possession of the title. The debtor gave a cashier's check dated June 28, 1995 in the amount of \$73,900.55 to Associates for it to release its lien on the tractor. The debtor also gave Harnett a check dated June 21, 1995 drawn on its own account in the amount of \$22,422.12. Although Associates states that its lien on the truck has been satisfied, it continues to hold possession of the title, and has asked this court for direction as to which party should receive the title.

Though the evidence is unclear on this point, the debtor subsequently obtained possession of the tractor and trailer (there was some evidence that Harnett kept the tractor and trailer at the debtor's business in between shipments), and for some unspecified reason, Harnett made a demand on H&N for their return. When the debtor refused, Harnett, aided by the Omaha Police Department, retrieved the tractor and trailer. The debtor then filed a replevin action against Harnett for return of the equipment.

O'Daniel and the debtor then entered into new lease agreements because the equipment described in the previous lease agreements was now the subject of the replevin action. O'Daniel gave the debtor an additional check dated July 11, 1995 in the amount of \$47,000 to obtain new equipment. Lease agreement 8347 was back dated to June 8, 1995 and called for a 1995 Kenworth Tractor with the serial number 1XKWDR9X4SS643869. Lease agreement 8357, dated July 1, 1995, called for a 1995 Kenworth Tractor with the serial number 1XKWDR9X4SS643868 (a serial number that is one digit off of the tractor called for in lease agreement 8347). There is no evidence as to what the debtor did with the \$47,000 it

received from O'Daniel, or whether it obtained or attempted to obtain the equipment called for in the new leases. Although O'Daniel claims that the tractors described in the new lease agreements were the subject of a subsequent transaction between the debtor and Harnett, there is no evidence to that effect, and Harnett specifically denies that he owned those tractors.

On April 9, 1996, the debtor filed its petition under Chapter 11, which was later converted to a chapter 7 on July 18, 1996. The Chapter 7 Trustee filed an adversary proceeding on October 31, 1996 naming Harnett and Associates as defendants and seeking turnover of the tractor and trailer. Harnett filed an answer on December 6, 1996, denying the allegations of the complaint, and asserting a counter claim against the estate. Associates filed an answer on December 20, 1996, denying the allegations in the complaint (although admitting that it received the cashier's check from the debtor), and asserting a cross claim against Harnett.

The Trustee and Harnett filed a motion to compromise the controversy on January 13, 1997. The agreement provided that Harnett would pay the sum of \$50,000 to the Trustee, and the Trustee would dismiss the adversary complaint and the replevin action in district court with prejudice.

O'Daniel filed both a resistance to the proposed settlement and a motion to intervene in the adversary proceeding on January 21, 1997. It claims that it has the same or similar causes of action against Harnett and Associates arising out of the same transactions, that its interest in the tractor and trailer is superior to that of the estate, and that its interest in the trailer is not being adequately represented by the Chapter 7 Trustee. Both Harnett and the Trustee filed resistances to the motion for intervention.

### **Decision**

O'Daniel has shown that it has a potential direct and substantial interest in the tractor and trailer that are the subject of the adversary proceeding. Accordingly, its motion to intervene is granted. The motion to compromise the controversy and O'Daniel's resistance to it are deferred pending a resolution of the nature of O'Daniel's interest.

### Discussion

O'Daniel asserts that it has various causes of action against the defendants in this adversary proceeding, including tortious interference of contract and unjust enrichment, and that it needs to intervene because its interests in the tractor and trailer are not being adequately represented.

Federal Rule of Civil Procedure 24(a)<sup>1</sup> provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). There is no statute of the United States conferring an unconditional right to intervene in this matter. Accordingly, O'Daniel must seek to prove that it may intervene pursuant to Fed. R. Civ. P. 24(a)(2).

To prevail on a motion to intervene in an adversary proceeding under Fed. R. Civ. P. 24(a)(2), the movant bears the burden of proving four elements: (1) a timely motion to intervene must have been filed; (2) a direct and substantial interest in the property or transaction; (3) potential impairment of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action. Richman v. First Woman's Bank (In re Richman), 104 F.2d 654, 658 (4th Cir. 1997); Vermejo Park Corp. v. Kaiser Coal Corp. (In re Kaiser Steel Corp.), 998 F.2d 783, 790 (10th Cir. 1993); Kowal v. Malkemus (In re Thompson), 965 F.2d 1136, 1142 (1st Cir. 1992); Midway

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<sup>1</sup>This rule is made applicable to adversary proceedings by Fed. R. Bankr. P. 7024.

Airlines, Inc. v. Northwest Airlines, Inc. (In re Midway Airlines, Inc.), 154 B.R. 248, 252 (N.D. Ill. 1993); Chalk Line Mfg., Inc. v. Frontenac Venture V Ltd. (In re Chalk Line Mfg., Inc.), 184 B.R. 828 (Bankr. N.D. Ala. 1995).

1. Timeliness

O'Daniel filed its motion to intervene approximately one month after the defendants filed responsive pleadings in the case. This court deems the motion timely.

2. Direct and Substantial Interest in Property

To prevail on a motion to intervene as of right, a movant must demonstrate a direct and substantial interest in the subject matter of the action. Lake Investors Development Group, Inc. v. Egidi Development Group, 715 F.2d 1256, 1259 (7th Cir. 1983). The interest "must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit . . . [and] must be so direct that the applicant would have 'a right to maintain a claim for the relief sought.'" Keith v. Daley, 764 F.2d 1265, 1268 (7th Cir.) (citations omitted), cert. denied, 474 U.S. 980, 106 S. Ct. 383, 88 L. Ed. 2d 336 (1985). Intervention may only be denied, however, if it appears that the proposed intervenor would not be entitled to relief under any set of facts which could be proved from the motion . . .

Midway, 154 B.R. at 252.

The evidence presented shows that O'Daniel gave the debtor a check in the amount of \$145,500 and that O'Daniel asserts that there was an oral contract between it and the debtor for the debtor to use the funds to purchase the vehicles covered by the lease agreements. There is also evidence that the debtor gave a cashier's check to Associates to release its lien on the tractor and that the debtor gave a check drawn on its own account to Harnett.

If the court assumes that the facts as alleged by O'Daniel are true, that there was an agreement between it and

the debtor and that the debtor utilized the funds to purchase the equipment owned by Harnett, O'Daniel could attempt to enforce the contract between the debtor and Harnett or to seek possession of the equipment from Harnett as a third party beneficiary of the contract, see Midway, 154 B.R. at 252 (intervenor asserted that it was a third party beneficiary of a contract, and on that basis was found to have an interest in the subject matter of the adversary proceeding), or that the debtor acted as its agent in the transaction. See, e.g., Southern Indus., Inc. v. United States, 326 F.2d 221 (9th Cir. 1964) (Principal may sue to recover under contract made by his agent); American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435 (S.D.N.Y. 1976) (same).

### 3. Potential Impairment of Interest

O'Daniel could potentially be foreclosed from enforcing its claim against Harnett based on the alleged contract between Harnett and the debtor if O'Daniel was not allowed to intervene.

### 4. Adequate Representation of Interest

O'Daniel's interest in the tractor and trailer are not being adequately represented at present. Both the debtor and the trustee have adverse interests to those of O'Daniel in the equipment.

As O'Daniel has met the four requirements of intervention, its motion to intervene in the adversary proceeding is granted. However, as the precise nature of O'Daniel's interest in the equipment is not known, a ruling on the motion to compromise a controversy and O'Daniel's resistance to the motion will be deferred.

Separate journal entry to be filed.

DATED: April 8, 1997

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

NAPIER, JAMES	344-3407
BECKER, ROBERT	393-2374
NOVOTNY, MARK E.	397-8450
KOUKOL, DAVID	498-0339
KOCOUREK, JOHN	712-322-4802

Copies mailed by the Court to:

United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
H & N TRUCKING, INC.,	)	CASE NO. BK96-80748
	)	
_____ DEBTOR(S)	)	
	)	CH. 7
	)	Filing No. 12, 14, 17;
	)	106, 108
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	DATE: April 8, 1997
_____ Defendant(s)	)	HEARING DATE: March 19, 1997

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Intervention filed by O'Daniel Oldsmobile, Inc.; and Motion to Compromise Controversy with Leslie Harnett.

APPEARANCES

James Napier, Attorney for debtor  
Robert Becker, Trustee  
David Koukol, Attorney for Associates  
Mark Novotny, Attorney for O'Daniel Olds  
John Kocourek, Attorney for Leslie Harnett

IT IS ORDERED:

Motion to intervene granted. Motion to approve the compromise and the resistance to the motion to approve compromise are deferred. Memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

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