

Reversed at 74 F.3d 848 (8th Cir. 1996).

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
RINE & RINE AUCTIONEERS, INC.,	)	CASE NO. BK92-80770
	)	A92-8149
DEBTOR(S)	)	
	)	
NATKIN & COMPANY,	)	CH. 7
Plaintiff(s)	)	Filing No.
vs.	)	
	)	
RICHARD MYERS, TRUSTEE,	)	
	)	
Defendant(s)	)	

MEMORANDUM

Hearing was held on February 8, 1994, on the above adversary complaint. Appearing on behalf of Natkin & Company was T. Randall Wright of Dixon & Dixon, P.C., Omaha, Nebraska. Appearing on behalf of Richard Myers was David Crawford of Schmid, Mooney & Frederick, P.C., Omaha, Nebraska. 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)(F).

The debtor was in the business of auctioning personal property for its customers. Natkin & Company (Natkin) employed the services of the debtor to sell certain business personal property owned by Natkin. The parties entered into a written agreement whereby Natkin made the property available to the debtor, and the debtor was to advertise and conduct a sale, collect the proceeds of the sale and remit the proceeds to Natkin.

Natkin did make the property available to the debtor. The debtor did advertise and conduct the sale. The debtor did collect the proceeds of the sale and deposited those proceeds into an account specifically set up by the debtor for the purpose of holding auction proceeds. Although the debtor, pursuant to the agreement between the parties, was to remit the net proceeds to Natkin within ten days after the sale, the debtor failed to do so prior to the bankruptcy case being filed.

The trustee takes the position that the proceeds of the Natkin sale, as well as the proceeds of other sales which were also deposited into the account containing the Natkin proceeds, are property of the debtor's estate and should be distributed to all creditors of the debtor on a proportionate basis. Natkin has sued the trustee and requests an order directing the trustee to remit the proceeds of the Natkin sale plus interest.

On the date the bankruptcy petition was filed, the account holding auction proceeds contained sufficient funds to pay the Natkin net proceeds plus most of the remaining claims against the account. At all times after the Natkin sale, the account held at least an amount equal to the full amount of the net proceeds of the Natkin sale.

The net amount due Natkin was \$32,680.00. The account had, on the petition date, April 27, 1992, \$45,403.00. The maximum amount of funds necessary to pay all of the auction customers whose funds had been deposited in the account is \$51,765.00.

Property of others held by the debtor at the time of filing of a bankruptcy petition is not property of the bankruptcy estate. In re N.S. Garrott & Sons, 772 F.2d 462 (8th Cir. 1985). To determine the debtor's interest in the proceeds of the Natkin sale, the Court must follow Nebraska law. Id., 772 F.2d 462, 466 (8th Cir. 1985).

The relationship between the debtor and Natkin is that of agent and principal. In Edwin Bender & Sons v. Ericson Livestock, 228 Neb. 157, 421 N.W.2d 766 (1988), the Nebraska Supreme Court defined the relationship between the seller of property at auction and the auctioneer:

An auctioneer, in selling property for another at auction, is the agent of the seller, and his rights and liabilities, in the absence of an applicable statute changing them, are governed by the general principles of the law of agency.

Id., 228 Neb. at 164, 421 N.W.2d at 770, 771.

The principal/agent relationship ends when the purpose of the relationship is achieved. **Restatement (Second) of Agency** § 106 (1958); Boettcher D.T.C. Bldg. Joint Venture v. Falcon Ventures, 762 P.2d 788, 790 (Colo. App. 1988); One Twenty Realty Co. v. Baer, 260 Md. 400, 272 A.2d 377, 381-82 (1971), Hardy v. Davis, 223 Md. 229, 164 A.2d 281, 283 (1960); Bassett v. Mechanics' Bank, 173 A. 228 (Conn. 1934).

The agreement between the debtor and Natkin specifically stated that the debtor was to auction the property, collect the proceeds, and remit the proceeds. The purpose of the relationship did not end until the proceeds were remitted to Natkin. The relationship did not change to that of debtor/creditor from agent/principal simply because the debtor failed to turn over the sale proceeds to Natkin. The agency agreement required such proceeds to be turned over to Natkin and until they were so turned over, the debtor continued to act as agent for Natkin. The property of Natkin, that is, the proceeds of the sale, did not become property of the debtor simply because the debtor failed to timely remit pursuant to the agreement. Where a principal/agent relationship is established property of the principal which is entrusted to the agent does not become property of the agent. In re Estate of Boschulte, 130 Neb. 284, 264 N.W. 881 (1936); In re Estate of Wiley, 150 Neb. 898, 36 N.W.2d 483 (1949).

The account holding auction proceeds contains at least the amount representing the net proceeds of the Natkin sale, \$32,680.00. That amount is property of Natkin and should be turned over by the trustee to Natkin.

Natkin requests the Court to order a payment of interest from the day the money was due, April 4, 1992, to the date of turn over pursuant to Neb. Rev. Stat. § 45-104. That section provides that interest on money received to the use of another and retained without the owner's consent, express or implied, is due at the rate of 12%. The amended complaint did contain a request for interest. Although outside of bankruptcy interest on funds held by an auctioneer and not timely remitted would appear to accrue at the rate stated in Neb. Rev. Stat. § 45-104, the funds in question have been held from April 27, 1992, until this date by a trustee in a Chapter 7 bankruptcy. Those funds were originally held in an account which also contained funds of other parties who had allowed the debtor to auction their personal property.

Because of the definition of property of the estate in 11 U.S.C. § 541, it seems that the trustee had at least a colorable argument that the funds held in the account on the petition date were property of the estate and were not property of Natkin. Although the finding of this Court in this memorandum is to the contrary of the position taken by the trustee, that position does not seem to have been taken in bad faith. This Court is not aware of the rate of interest that the trustee has been able to earn on the funds since taking possession on or about April 27, 1992. It would be unfair to the general creditors of the estate and to the other parties whose funds were held by the debtor in the same account as the funds of Natkin to direct the trustee to pay the statutory 12% interest rate. Therefore, the Court will not order

such an interest payment, but directs the trustee to turn over the net amount of the funds plus Natkin's proportionate share of interest earned by the trustee since taking possession of the funds.

Judgment shall be entered in favor of the plaintiff in the amount of \$32,680.00 with interest calculated according to the above paragraph from April 27, 1992, or the date the trustee actually took possession of the fund.

DATED: April 20, 1994.

BY THE COURT:

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

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing  
[ ] Chapter 13 Trustee [ ] Chapter 12 Trustee [ ] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.

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CH. 7  
Filing No.

DATE: April 20, 1994  
HEARING DATE: February  
8, 1994

JUDGMENT

Judgment entered in favor of the plaintiff in the amount of \$32,680.00 plus interest.

BY THE COURT:

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

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing  
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