IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
H & N TRUCKING, INC.,	)	CASE NO. BK96-80748
	)	A96-8124
DEBTOR(S)	)	CH. 7
	)	Filing No. 56, 59
THOMAS D. STALNAKER, TRUSTEE,	)	
of the bankruptcy estate of	)	
H & N TRUCKING, INC.,	)	
	)	
Plaintiff(s)	)	
vs.	)	
	)	
LESLIE HARNETT, an individual and	)	
ASSOCIATES COMMERCIAL CORP.	)	
A Corporation	)	
Defendant(s)	)	
	)	
vs.	)	
	)	
O'DANIEL OLDSMOBILE, INC.,	)	
d/b/a O'DANIEL EXECUTIVE LEASING	)	
a Nebraska Corporation,	)	
Intervenor	)	

MEMORANDUM

Appearances: Robert Becker, Attorney for Trustee, and Mark Novotny, Attorney for O'Daniel Oldsmobile. 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) and (O).

Background

An order for relief under Chapter 7 of the bankruptcy code was entered for the debtor, H & N Trucking, (hereafter "H & N") on April 4, 1996. Thomas D. Stalnaker was appointed as the Chapter 7 Trustee (hereafter "Trustee"). The Trustee filed the present adversary proceeding against Leslie Harnett

(hereafter “Harnett”) and Associates Commercial Corp. (hereafter “Associates”) seeking turnover of property of the estate.

The Trustee’s complaint alleges that in June of 1995, H & N and Harnett entered into an oral contract for the sale of a 1995 Kenworth tractor (hereafter “Vehicle 1") and a 1995 Great Dane trailer (hereafter “Vehicle 2").[1] Vehicles 1 and 2 were to be purchased for $96,322.67, of which $22,422.12 was to be paid to Harnett and the remaining $73,900.55 to Associates. Associates had a security interest in Vehicles 1 and 2, as well as possession of the titles, to secure a debt from Harnett in the amount of $73,900.55. The payments were made by H & N to both Associates and Harnett, but the transaction was not completed and H & N did not receive the vehicles or titles to the vehicles. The Trustee, Harnett and Associates reached a settlement of this adversary proceeding and circulated notice of the proposed settlement agreement.

O’Daniel Oldsmobile, Inc., d/b/a O’Daniel Executive Leasing, (hereafter “O’Daniel”) objected to the proposed settlement and filed its intervention complaint. O’Daniel argues that any funds received by the trustee, by settlement or otherwise, belong to it, not to the bankruptcy estate. O’Daniel’s allegations in the complaint of intervention are essentially the same as found in the Trustee’s complaint against Harnett and Associates. Additionally, O’Daniel asserts that it provided the funds to H & N to purchase the vehicles; that O’Daniel was to be the owner of Vehicles 1 and 2; that H & N had entered into two lease agreements to lease Vehicles 1 and 2 from O’Daniel; and that O’Daniel’s claim to the vehicles or the value paid for the vehicles is superior to that of the Trustee.

The Trustee filed this Motion for Summary Judgment against O’Daniel, in essence asserting that O’Daniel is a pre-petition unsecured creditor of H & N and that O’Daniel’s

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[1]Since this Motion for Summary Judgment involves only the Trustee, as Plaintiff, and O’Daniel, the Intervenor, the Court will consider the factual allegations in the Complaint and Complaint of Intervention as true, notwithstanding Harnett’s denial of the existence of the oral contract and Harnett’s and Associates’ numerous defenses raised in their respective answers.

interest in the two vehicles is inferior to the Trustee's interest, as the Trustee represents all unsecured pre-petition creditors. O'Daniel resists the motion for summary judgment, arguing that material issues of fact exist regarding the superiority of its claim to the two vehicles.

Undisputed Facts

The following is a summary of the undisputed facts as between H & N and O'Daniel. H & N and Harnett entered into an oral contract for the sale of Vehicles 1 and 2. Thereafter, representatives of O'Daniel and H & N agreed that O'Daniel would advance the funds necessary for the purchase of the vehicles, H & N would transfer title to O'Daniel, and O'Daniel would lease back Vehicles 1 and 2 to H & N. O'Daniel then advanced to H & N $145,000 by check number 4227 dated June 8, 1995. The check was deposited in H & N's corporate bank account and commingled with other corporate funds. H & N issued check number 009686 on its Ashland State Bank account for $22,422.12 to Harnett. H & N issued check number 005754 on its Packers Bank & Trust Co. account for $73,900.55 to Associates. Harnett and Associates did not transfer title to Vehicles 1 and 2 to H & N nor did Harnett and Associates return the money paid to them by H & N. H & N and O'Daniel have no written contract memorializing their agreement.

Analysis

A. Summary Judgment

The United States Supreme Court, in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) addressed the requirements for summary judgment under Federal Rule of Civil Procedure 56. The Court stated that "[u]nder Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. at 322. Additionally, the Supreme Court stated that Rule 56(c):

> mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

> which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 322-23.

Federal Rule of Civil Procedure 56 is applicable to bankruptcy adversary proceedings. Fed. R. Bankr. P. 7056.

B. O'Daniel's Complaint of Intervention

O'Daniel's exact cause of action against Associates and Harnett is difficult to determine from the pleadings and briefs. H & N entered into an oral contract with Harnett to purchase Vehicles 1 and 2. By agreement, O'Daniel advanced monies to H & N to enable H & N to purchase Vehicles 1 and 2 and transfer title to O'Daniel.[2] H & N paid certain sums of money to Harnett and Associates. H & N did not receive the title to the vehicles or a return of the money it paid to Harnett and Associates. O'Daniel argues that Harnett and Associates have been unjustly enriched with O'Daniel's money. O'Daniel's claim is essentially a claim of third party unjust enrichment.[3] In addition, O'Daniel argues, for the first time

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[2]O'Daniel and H & N had entered into separate contracts, in which H & N would lease Vehicles 1 and 2 from O'Daniel after the successful purchase. The lease contracts are not at issue in the current Motion for Summary Judgment.

[3]O'Daniel's claim is not based upon either third party beneficiary or agency. In Nebraska, "[i]n order for those not named as parties to a contract to recover thereunder as third party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and provision was made for them." Properties Investment Group of Mid-America v. Applied Communications, Inc., 242 Neb. 464, 470, 495 N.W.2d 483

in its brief in resistance to the motion for summary judgment, that the Court should impose a constructive trust on the funds for O'Daniel, thus removing the funds from the bankruptcy estate.

C. Unjust Enrichment

1. Generally

A cause of action based on unjust enrichment does exist in Nebraska. McIntosh v. Borchers, 201 Neb. 35, 266 N.W.2d 200 (1978). The Nebraska Supreme Court recently addressed the requirements for unjust enrichment and the Court stated:

> [t]he doctrine of unjust enrichment is recognized only in the absence of an agreement between the parties. Zuger v. North Dakota Ins. Guar. Ass'n, 494 N.W.2d 135 (N.D.1992); Kolentus v. Avco Corp., 798 F.2d 949 (7th Cir.1986), *cert. denied* 479 U.S. 1032, 107 S.Ct. 878, 93 L.Ed.2d 832 (1987); Maxted v. Barrett, 198 Mont. 81, 643 P.2d 1161 (1982). The doctrine does not operate to rescue a party from the consequences of a bad bargain. George v. Tanner, 108 Idaho 40, 696 P.2d 891 (1985).

Washa v. Miller, 249 Neb. 941, 950, 546 N.W.2d 813, 818-19 (1996). A claim of unjust enrichment is based upon quasi-contract theory, which is a contract implied in law, where no

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(1993), *citing* Osmond State Bank v. Uecker Grain, 227 Neb. 636, 419 N.W.2d 518 (1988). Agency is a fiduciary relationship resulting from one person's manifested consent that another may act on his behalf and subject to his control and the other persons consent to so act. Landmark Enterprise, Inc. v. M.I. Harrisburg Associates, 250 Neb. 882, 886, 554 N.W.2d 119, 122 (1996); Andrews v. Schram, 252 Neb. 298, 303, 562 N.W.2d 50, 54 (1997); *See also* In re Rine & Rine Auctioneers, Inc., 74 F.3d 854 (8th Cir. 1996). Since O'Daniel has not alleged, argued or offered any evidence that it was an intended third party beneficiary of the H & N and Harnett contract or that H & N was O'Daniel's agent, the Court will not consider these theories of recovery further.

contract existed. Professional Recruiters, Inc. v. Oliver, 235 Neb. 508, 515, 456 N.W.2d 103, 108 (1990).

In a commercial transaction such as this, either the parties had an express contract regarding the transaction, under which the aggrieved parties rights are determined, or no contract existed and an aggrieved party may petition a court to impose a quasi-contract to avoid any alleged inequities.

O'Daniel, in its complaint of intervention, alleges that H & N and Harnett entered into an oral contract for the sale of Vehicles 1 and 2 to H & N. O'Daniel's assertion of the existence of a contract directly conflicts with its claim of unjust enrichment and eliminates it. Either H & N and Harnett entered into an express contract for the purchase of Vehicles 1 and 2 or they did not. If a contract for the sale of Vehicles 1 and 2 between H & N and Harnett existed, then any claim by O'Daniel against Harnett would have to be based on O'Daniel's rights, if any, under the H & N and Harnett contract. If no contract existed between H & N and Harnett for the sale of Vehicles 1 and 2, then O'Daniel's claim could be the quasi-contract theory of unjust enrichment. Since O'Daniel has pled that an express contract existed between H & N and Harnett, O'Daniel is barred from asking the court to impose a quasi-contract and allow an unjust enrichment claim.

However, even if no contract exists between H & N and Harnett concerning the use of the money, O'Daniel still does not have an unjust enrichment claim against Harnett and Associates. At a minimum, to succeed on a claim of unjust enrichment, a party must establish: (1) a benefit was conferred on one person by another and (2) it would be inequitable and unconscionable to permit the party receiving the benefit to retain the benefit without paying its reasonable value. Professional Recruiters, 235 N.W. at 515, 456 N.W.2d at 108.

O'Daniel cannot establish the first element. At best, O'Daniel conferred a benefit upon H & N and H & N conferred a benefit upon Harnett and Associates. H & N and Harnett entered into their oral contract prior to O'Daniel's involvement. The money received by Harnett and Associates was paid to them by checks issued by H & N drawn on its corporate accounts. O'Daniel was not a party to the H & N and Harnett transaction and it did not transfer funds directly to Harnett

or Associates. O'Daniel did not participate or transact with Harnett or Associates. O'Daniel did not directly confer a benefit upon Harnett or Associates.

2. Third Party Unjust Enrichment

O'Daniel's claim is apparently based upon the theory of third party unjust enrichment. O'Daniel cites five Nebraska cases in support of its unjust enrichment claim. The five cases are: Wrede v. Exchange Bank of Gibbon, 247 Neb. 907, 531 N.W.2d 523 (1995); Sesostris Temple Golden Dunes v. Schuman, 226 Neb. 7, 409 N.W.2d 298 (1987); Kramer v. Kramer, 252 Neb. 526, 567 N.W.2d 100 (1997); Brtek v. Cihal, 245 Neb. 756, 515 N.W.2d 628 (1994); and Wells v. Wells, 3 Neb.App. 117, 523 N.W.2d 711 (1994). All of the cases are completely factually distinguishable from O'Daniel's argument. None of the five Nebraska cases involved a claim by a third party of unjust enrichment. Rather each of the cases involved a business or marital relationship between two entities. O'Daniel cites no legal authority, from this jurisdiction or any other, that even remotely supports a cause of action based upon third party unjust enrichment. The Court was also unable to locate a case that provided for recovery under this theory.

In sum, O'Daniel is barred from arguing the existence of an express oral contract and, at the same time, seeking relief on an unjust enrichment theory, since a claim of unjust enrichment exists only in the absence of a contract. Additionally, O'Daniel, as a matter of law, has not asserted a viable cause of action against Harnett and Associates. O'Daniel may have a breach of contract claim against H & N. If so, it is a contingent and unliquidated claim against H & N's bankruptcy estate.

D. Property of the Estate or Constructive Trust?

The commencement of a bankruptcy case creates an estate that includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "The scope of this section is very broad and includes property of all descriptions, tangible and intangible, as well as causes of action." Whetzal v. Alderson, 32 F.3d 1302, 1303 (8th Cir. 1994); *citing* United States v. Whiting Pools, Inc., 462 U.S. 198, 205 & n. 9, 103 S.Ct. 2309, 2313 & n. 9, 76 L.Ed.2d 515 (1983).

However, property in which an entity may establish a constructive trust, under applicable state law, is not included as property of the bankruptcy estate. Chiu v. Wong, 16 F.3d 306, 310 (8th Cir. 1994); 11 U.S.C. § 541(d). The remedy of a constructive trust in bankruptcy is rarely granted and only in the most egregious of circumstances. Shubert v. Jetter (In re Jetter), 171 B.R. 1015, (Bankr.W.D. Mo 1994), *aff'd* 178 B.R. 787 (W.D.Mo. 1995), *aff'd* 73 F.3d 205 (8th Cir. 1196).

If O'Daniel is entitled to a constructive trust in its favor, the property is not property of the estate, and O'Daniel's interest is superior to that of the Trustee. However, if O'Daniel is unable to establish a constructive trust under Nebraska law, then the cause of action and any recovery based thereon is property of the estate and the Trustee's interest is superior to O'Daniel's interest.

In support of its position that "[a] constructive trust is a relationship with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his or her acquisition or retention of the property would constitute unjust enrichment," O'Daniel cites three Nebraska cases. The three cases are: I.P. Homers, Inc. v. Radtke, 5 Neb.App. 271, 558 N.W.2d 582 (1997); Knoell v. Huff, 224 Neb. 90, 395 N.W.2d 749 (1986); and Balfany v. Balfany, 239 Neb. 391, 476 N.W.2d 681 (1991).

The above definition of "constructive trust" is correctly quoted from the case law. However, a constructive trust is not a remedy lightly granted. The Nebraska Court of Appeals, in I.P. Homers stated:

> Generally, a court sitting in equity will not impose a constructive trust and constitute an individual as a trustee of the legal title for property unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to property by fraud, misrepresentation, or an abuse of an influential or confidential relation and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.

I.P. Homers, 5 Neb.App. at 287; *citing* Brtek, *supra*, Wells, *supra*.

Applying this standard to the present case, O'Daniel's assertion of constructive trust fails as a matter of law. O'Daniel has not alleged, argued or offered any evidence that H & N or Harnett and Associates obtained O'Daniel's "property" by fraud, misrepresentation, or an abuse of an influential or confidential relationship.

Under the Celotex, *supra*, standard for summary judgment, O'Daniel's failure to offer any evidence in support of its position that it is entitled to a constructive trust, as the party with the burden of proof at trial on that issue, mandates entry of summary judgment in favor of the trustee "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 322-23. Without the constructive trust, the cause of action and any recovery is property of the estate. Whetzal, *supra*.

Conclusion

No material facts are in dispute. As a matter of law, O'Daniel has not asserted a viable claim against Harnett and Associates. Any recovery against Harnett and Associates by the Trustee is not subject to a constructive trust in favor of O'Daniel. The Trustee is entitled to a judgment. The Motion for Summary Judgment against the Intervenor, O'Daniel, is granted.

Separate journal entry to be filed.

DATED: April 17, 1998.

BY THE COURT:

/s/ Timothy J. Mahoney

Chief Judge

Copies faxed by the Court to:

BECKER, ROBERT	393-2374
NOVOTNY, MARK E.	397-8450

KOUKOL, DAVID	498-0339
KOCOUREK, JOHN	712-322-4802
NAPIER, JAMES	397-7137

Copies mailed by the Court to:

Thomas A. Gleason, 502 Scoular Building, 2027 Dodge Street, Omaha, NE 68102
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
	)	A96-8124
DEBTOR(S)	)	
	)	CH. 7
THOMAS D. STALNAKER, TRUSTEE,	)	
of the bankruptcy estate of	)	
H & N TRUCKING, INC.,	)	Filing No. 56, 59
Plaintiff(s)	)	
vs.	)	JOURNAL ENTRY
	)	
LESLIE HARNETT, an individual	)	
and ASSOCIATES COMMERCIAL	)	
CORP., A Corporation,	)	
	)	DATE: April 17, 1998
Defendant(s)	)	HEARING DATE:
vs.	)	
	)	
O'DANIEL OLDSMOBILE, INC.,	)	
d/b/a O'DANIEL EXECUTIVE	)	
LEASING, a Nebraska Corp.,	)	
Intervenor	)	

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Summary Judgment Against Intervenor on the Complaint of Intervention and Intervenor's Resistance.

IT IS ORDERED:

No material facts are in dispute. As a matter of law, O'Daniel has not asserted a viable claim against Harnett and Associates. Any recovery against Harnett and Associates by the Trustee is not subject to a constructive trust in favor of O'Daniel. The Trustee is entitled to a judgment. The Motion for Summary Judgment against the Intervenor, O'Daniel, is granted. See Memorandum entered this date.

BY THE COURT:

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

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