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COURT OF APPEALS

NO. 35028-9-II

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
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DEBORAH DEVENY,

Appellant,

v

COLLETTE HADALLER and JOHN DOE HADALLER, DEBBIE
SIMONS AND JOHN DOE SIMONS, HEALTHY FOUNDATIONS,
INC., and LIFE AND GOODNESS, INC.,

Respondents.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

I. Assignments of Error

No.1 The trial court erred in entering its May 5, 2006, Order dismissing on summary judgment DeVeny's tort claims.

No.2 The trial court erred in entering its May 5, 2006, Order dismissing on summary judgment DeVeny's Breach of Contract claim.

No.3 The trial court erred when it denied DeVeny's motion for reconsideration on May 24, 2006.

II. Issues Pertaining to Assignments of Error

No.1 There was no basis in law or fact for the trial court to dismiss DeVeny's tort claims which arose on August 25, 2003, after her bankruptcy was closed on July 22, 2003. (Assignment of Error No.1)

No.2 The trial court did not have jurisdiction to enter an order apparently intended to preserve a closed bankruptcy estate because 28 U.S.C. 1334(a) provides that only district courts have original and exclusive jurisdiction of all cases under Title 11 and 28 U.S.C. § 1334(e) provides that the district court, not the trial court, "shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of the case, and of property of the estate." (Assignment of Error No.1 and No.2)

No.3 Even under the bankruptcy code, there is no authority to disregard the rights of the debtor and creditors and confer upon a non-creditor third party the property of the bankruptcy estate. (Assignment of Error No.1 and No.2).

No.4 The Respondents were unjustly enriched. (Assignment of Error No.1 and No.2).

No.5 The trial court should have stayed DeVeny's civil action so that she could petition the bankruptcy court to reopen her case and adjudicate the bankruptcy issues. (Assignment of Error No.1 and No.2)

B. STANDARD OF REVIEW FOR ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

All of the above stated issues pertaining to the assignments of error stem from the trial court's May 5, 2006, Order dismissing all of DeVeny's claims on summary judgment. When reviewing an Order for summary judgment, this court engages in the same inquiry as the trial court. Marthaller v. King Co. Hospital Dist. No. 2, 94 Wn. App 911, 915, 973 P.2d 1098 (1999). Appellate courts review summary judgments de novo, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. Allstate Ins. Co. v. Raynor, 143 Wn.2d 469, 475, 21 P.3d 707 (2001).

C. STATEMENT OF THE CASE

DeVeny appeals from the summary judgment Order entered on May 5, 2006, by the Honorable Gary R. Tabor dismissing her claims for Violation of Washington Uniform Trade Secrets Act, Tortious Interference with Business Relations, Intentional Misrepresentation – Deceit, Misappropriation of Trade Name, Violation of Consumer Protection Act and Breach of Contract. DeVeny also appeals the denial of her motion for reconsideration by the court on May 24, 2006.

1. Summary of Background Facts

DeVeny owned and operated her tanning business, Tropic Tanz, from November, 1999, until the summer of 2003 when two well-seasoned business women, Respondents Collette Hadaller and Debbie Simons, through deceit and manipulation, misappropriated her client lists, trade name, leasehold interest, tanning beds and other office equipment and furniture. Because the Respondents refused to pay her for her property, DeVeny filed a law suit against them in July, 2004.

a. DeVeny Was the Owner of Her Tanning Business, “Tropic Tanz” Until it was Misappropriated by the Respondents

DeVeny opened her business, Tropic Tanz, in November of 1999 at 116 Progress Square, Winlock, WA 98596. CP 190. DeVeny worked long hours to build her business and had a client base of about 2000 patrons. CP 190. Respondents, Collette Hadaller and Debbie Simons,

owners of multiple “Curves” fitness franchises, entered Tropic Tanz intent on renting half the space to open another “Curves” franchise. CP 190. DeVeny rebuffed their proposal, but offered to let them buy out her business and leasehold interest. After brief consideration, the Respondents agreed to purchase Tropic Tanz and the leasehold interest for \$35,000. CP 190-191.

DeVeny had filed for bankruptcy on or about April 10, 2003. CP 5. In her bankruptcy schedules, DeVeny listed Tropic Tanz, her leasehold interest, tanning beds, and other office equipment and furniture as assets. CP 72. During her bankruptcy hearing with bankruptcy trustee, Terrence Donahue, DeVeny disclosed her income from the operation of Tropic Tanz. CP 72. The trustee expressed no interest to DeVeny in her scheduled assets and DeVeny understood that her case would be discharged without any of her assets being administered by the trustee to pay creditors. CP 72; CP 59-60. The trustee determined that there was not sufficient value to administer the assets and filed a Trustee’s Report of No Distribution and the case was closed. CP 59-60. DeVeny’s case was discharged on July 22, 2003. CP 5.

On June 27, 2003, DeVeny and the Respondents agreed that the Respondents would remodel the premises to facilitate them opening a Curves franchise to operate along with Tropic Tanz and that the “grand

opening” would be September 1, 2003, by which time the Respondents had to pay DeVeny the \$35,000 purchase price. CP 190-191 On June 28, 2003, the Respondents told DeVeny that they discovered that another fitness center was opening on July 26, 2003, in close proximity to the Winlock site. CP 191. The Respondents insisted that they had to open Curves before their competitor, consequently the sale had to close as soon as possible. CP 191. It was tentatively agreed that the sale would close and that the Respondents would have their grand opening on Monday, July 21, 2003. CP 191. However, on July 18, 2003, DeVeny’s mother suffered a heart attack and, with the full knowledge of the Respondents, she left town to take care of her mother. CP 191-193.

When DeVeny returned to Winlock at the end of July or early August, 2003, she found that the Respondents had locked her out of her business, refused to pay her for it and were operating it as their own. CP 192-193. Respondent, Collette Hadaller, testified in deposition that she determined on August 12, 2003, that DeVeny had abandoned her business. CP 188:13-16. At that time, however, DeVeny was in Winlock and in communication with the Respondents trying to get paid the purchase price; DeVeny reluctantly agreed to accept only \$12,200 for her property. CP 195-196. By letter dated August 25, 2003, the Respondents informed

DeVeny that they had decided to pay her nothing for Tropic Tanz. CP 197.

The Respondents utilized DeVeny's equipment to service DeVeny's clients and took payment from the clients which they retained. CP 200-202. After months of servicing DeVeny's clients, the Respondents instructed employee, Amanda Whisler, to input all the information contained on DeVeny's client cards/lists to their new computerized client database. CP 200-202. The Respondents have never paid DeVeny anything for her business, including her client lists. CP 193.

2. **Procedural History**

- a. **As non-creditor third parties the Respondents requested the superior court to sit in bankruptcy and confer upon them property, they argued, was owned by the bankruptcy estate.**

On April 4, 2006, the Respondents filed their fifth summary judgment motion, but this time as non-creditor third parties requesting relief under the Bankruptcy Code. CP 74. Respondents requested that Thurston County Superior Court Judge, Gary R. Tabor, open DeVeny's closed federal bankruptcy case and dismiss all of DeVeny's tort claims because, they stated, "at the time these torts were allegedly committed the tanning salon was an asset of the bankruptcy estate, not the plaintiff," therefore, "the plaintiff does not have standing to complain even if a tort

were committed.” CP 85-86. The Respondents completely disregarded the fact that DeVeny’s tort claims arose on August 25, 2003, when they refused to pay her a purchase price for her business. Thirty-four days after DeVeny’s bankruptcy was discharged.

The Respondents requested that the superior court sit in bankruptcy and disregard the rights of DeVeny/debtor and her bankruptcy creditors and confer upon them property they readily admitted did not belong to them. CP 74-87.

The Respondents also requested that the trial court void the June 27, 2003, contract for the sale of Tropic Tanz on the basis that DeVeny did not have the capacity to enter into the contract arguing the business was the property of the bankruptcy estate. CP 74-87. The Respondents also claimed that DeVeny was judicially estopped from pursuing her claims. CP 83-85.

b. **DeVeny’s response to the Respondents’ summary judgment motion was supported by an affidavit from bankruptcy trustee, Terrence Donahue.**

On March 24, 2006, the trial court granted the Respondents motion to continue the April 3, 2006, trial date so that they could file a summary judgment motion regarding DeVeny’s April, 2003, bankruptcy filing. CP 67. In granting the motion, the court expressed concern about the

complexity of bankruptcy law and its lack of familiarity with it. RP 17. DeVeny responded by informing the court that she would contact the bankruptcy trustee to determine his/her position on the issue of whether the June 27, 2003, contract for the sale of Tropic Tanz was the property of the bankruptcy estate. Or hers CP 67. The court agreed that this was an appropriate course of action. CP 67.

In response to the court's acknowledgements and with great concern about the Respondents motives in bringing bankruptcy issues before an inexperienced state superior court, DeVeny located the bankruptcy trustee in her case, Terrence Donahue, and explained to him the issue before the court and requested that he inform the court of his position, as the bankruptcy trustee, regarding DeVeny's sale of her business. CP 63-65, CP 67.

Mr. Donahue informed DeVeny that he considered the June 27, 2003, contract post-petition – entered into after the Plaintiff filed for bankruptcy – and, therefore, exempt from the bankruptcy estate. He said he did not intend to pursue the contract on behalf of the bankruptcy estate and that DeVeny was free to pursue her breach of contract claim. CP 59-60.

On April 25, 2006, DeVeny filed her opposition to the Respondents' motion for summary judgment supported by Mr. Donahue's

affidavit which she believed the court would use as the basis for denying the Respondents' motion. CP 66-73. CP 59-60.

c. **The trial court found that DeVeny's tort claims did not exist.**

On May 5, 2006, the court found as follows:

“Here's the way I see this situation. It is this court's opinion that the plaintiff did not on June 27th have the capacity to enter into contract to sell Tropic Tanz because the matter was part of the bankruptcy estate at that time, as such, any alleged contract is null and void. It does not exist. For that reason, this court has then considered other claims by plaintiff in this particular case that are characterized as tort claims but all appear to arise from the plaintiff's allegations that a contract was breached. This court is going to grant summary judgment to the defendants for the reasons I've just stated.”

Even though DeVeny's tort claims arose on August 25, 2003, separate and distinct from her June 27, 2003, breach of contract claim the court inexplicably found them to be one and all non-existent. The trial court found that DeVeny's “other claims” were not tort claims and did not exist even though the Respondents locked her out of her business and refused to pay her for her clients lists, her trade name, her lease hold interest, her tanning beds, and her other office equipment and furniture.

The court's dismissal of DeVeny's tort was an erroneous application of tort law. DeVeny worked tirelessly to build a business that she thought she had sold to the Respondents. When, on August 25, 2003,

it turned out their *modus operandi* was to swindle her out of it, separate, distinct, and legitimate tort claims arose. By stating that DeVeney's tort claims did not exist because it found the June 27, 2003, contract was null and void, the court erroneously ruled that DeVeney could not assert tort claims separate from her breach of contract claim.

- d. **Having acknowledged the complexity of bankruptcy law and its lack of familiarity with it and the need for input from the bankruptcy trustee, the trial court inexplicably disregarded Mr. Donahue's explanation of the applicable law and his determination and granted the Respondents' motion for summary judgment.**

Before giving its decision on the Respondent's motion for summary judgment, the trial court stated "despite all the background and the arguments that have been presented to me previously, the present issue before me is quite complex, in the Court's opinion." RP 17. And "I indicated previously when I ruled that we would not go forward with the scheduled trial date and I would allow time for the defendants to file a summary judgment motion that I was not an expert on bankruptcy and, obviously, that is still the case." RP 17.

The trial court then disregarded the trustee's explanation of the applicable bankruptcy law and his determination regarding DeVeney's sale of Tropic Tanz by stating:

I will indicate that while I respect people having a job to do in various capacities, and in this case the trustee in bankruptcy had a job to do and that estate was closed, but he has now given some opinion about this particular matter. That's only an opinion, in this Court's thinking, and in no way binds this Court one way or the other. Whether or not this is a claim that the bankruptcy estate would have pursued or might consider pursuing in the future is not really before this Court.

RP 20.

- e. **The trial court acknowledged that by granting the summary judgment motion it was unjustly enriching the Respondents.**

With no legal basis, the trial court dismissed DeVeny's tort claims and intentionally unjustly enriched the Respondents:

I am troubled by the fact that there are still issues about whether or not the defendants in this case have somehow been unjustly enriched. I understand there are arguments on both sides. The plaintiff has alleged that her business was taken away from her inappropriately; the defendants have countered that her business was abandoned. It's my understanding that there were some chattels, if you will, or personal property, some tanning beds that were originally possessed and used by the defendants but those have been turned back over to the plaintiff. There still might be issues about the use of such equipment. I say all that to indicate that I don't believe that issue is before me and I'm not making any ruling about that.

RP 18.

With respect to the Respondents' other arguments, the trial court stated that it would not have granted summary judgment on the issue of judicial estoppel or standing. RP 19. The trial court made this statement even

though the Respondents requested that DeVeny's tort claims be dismissed on the grounds that she had not standing to bring them. CP 86.

DeVeny filed a motion for reconsideration which was denied by letter dated May 24, 2006.

D. SUMMARY OF ARGUMENT

The Respondents, experienced business women and owners of multiple businesses, through deceit and duplicity, manipulated DeVeny, a small town, small business owner, in order to swindle her out of the business she had worked tirelessly for almost four years to build. DeVeny sued in tort and in contract and on the eve of trial, when DeVeny would seek justice from twelve of her peers, the Respondents filed their fifth summary judgment motion, this time based on DeVeny's bankruptcy filing in April 2003.

The motion was crafted to confuse a trial court that previously acknowledged it viewed bankruptcy law as complex and with which it lacked familiarity. The Respondents requested the superior court to sit in place of the bankruptcy court and confer upon them, as non-creditor third parties, DeVeny's business which, they argued, was the property of the bankruptcy estate. DeVeny asserts:

- a. That there was no basis in law or fact for the trial court to dismiss her tort claims which arose on August 25, 2003, after DeVeny's bankruptcy was closed on July 22, 2003.

- b. The trial court did not have jurisdiction to enter an order apparently intended to preserve a closed bankruptcy estate because 28 U.S.C. 1334(a) provides that only district courts have original and exclusive jurisdiction of all cases under Title 11 and 28 U.S.C. § 1334(e) provides that the district court, not the trial court, "shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of the case, and of property of the estate."
- c. Even under the bankruptcy code there is no authority to disregard the rights of the debtor and creditors and confer upon a non-creditor third party the property of the bankruptcy estate.
- d. The Respondents were unjustly enriched.
- e. The trial court should have stayed DeVeny's civil action so that she could petition the bankruptcy court to reopen her case and adjudicate the bankruptcy issues.
- f. DeVeny is entitled to attorneys' fees on appeal pursuant to RAP 18.1.

E. ARGUMENT

I. Introduction.

The Respondents in their summary judgment motion asked the trial court to grant them relief under the Bankruptcy Code. They did not cite any authority for this unusual request because there is none. They chose not to seek relief from the bankruptcy court because there is no basis under the Bankruptcy Code for the relief they sought. Instead the Respondent sought to accomplish their purpose by inducing the trial court

to enter an order based on bankruptcy law with which the court admitted an understandable lack of familiarity.

II. There Was no Basis in Law or Fact for the Court to Dismiss DeVeny's Tort Claims Which Arose After Her Bankruptcy Closed.

DeVeny's tort claims accrued when she became aware of them. See e.g. Kinney v. Cook, 130 Wash.App. 436, 123 P.3d 508, (Div. 3, Nov 22, 2005). It is undisputed that DeVeny was the owner of Tropic Tanz when she left to take care of her mother on July 18, 2003. DeVeny discovered that she was locked out of Tropic Tanz when she returned from tending to her sick mother after her discharge on July 22, 2003. Respondents did not refuse to pay DeVeny until August 25, 2003. It is impossible for DeVeny's tort claims to be part of a bankruptcy discharged on July 22, 2003.

a Ownership of All Scheduled Assets Reverted Back to DeVeny on July 22, 2003.

DeVeny filed for bankruptcy on or about April 10, 2003. Among the assets scheduled in the bankruptcy case were her tanning salon, Tropic Tanz (including client lists and trade name), her leasehold interest for the Winlock location, tanning beds, office equipment and furniture.

DeVeny was discharged in bankruptcy on July 22, 2003, at which time the scheduled assets were abandoned to her pursuant to 11 U.S.C. §

554(c); See e.g. In re Smith Douglas, 75 B.R. 994, 996 (E.D. N.C. 1987),
aff'd 856 F.2d 12 (4th Cir. 1988). 11 U.S.C. § 554(c) provides:

Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

After reviewing the above stated assets scheduled in DeVeny's bankruptcy case, the trustee, Terrence Donahue, determined there was not sufficient value to administer any assets and, accordingly, he filed a Trustee Report of No Distribution and DeVeny's case was closed on July 22, 2003. Pursuant to 11 U.S.C. § 554(c) said scheduled assets reverted back to DeVeny.

III. The Trial Court Did Not Have Jurisdiction to Enter an Order Apparently Intended to Preserve a Closed Bankruptcy Estate.

28 U.S.C. § 1334(a) provides that the district courts shall have original and exclusive jurisdiction of all cases under Title 11. See DeMuth et al. v. Faw et al., 103 Wash. 279, 174 P. 18 (1918). The district court, not the superior court, "shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of the case, and of property of the estate." 28 U.S.C. § 1334(e).

11 U.S.C. § 350 provides:

- (a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.
- (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

Here, the trial court purported to displace the Bankruptcy Court in the administration of the bankruptcy estate in DeVeny's closed bankruptcy case. The trial court had no such jurisdiction.

IV. There is no Authority in the Bankruptcy Code to Confer Upon a Non-Creditor Third Party the Property of the Bankruptcy Estate.

The trial court's decision to confer the property of the bankruptcy estate to the non-creditor third party Respondents was without any authority contained in the bankruptcy code.

V. The Trial Court's Order Works a Manifest Injustice.

The property at issue was the property of DeVeny, it became the property of the bankruptcy estate, and as a matter of law when the bankruptcy closed, it became the property of DeVeny. The Respondents wrongfully deprived DeVeny of this property and have been unjustly enriched by their unlawful actions and the decision of the trial court.

a. The Respondents have been Unjustly Enriched.

A quasi contract or a contract implied in law arises from an implied legal duty or obligation. Quasi contracts are founded on the equitable principle of unjust enrichment which simply states that one

should not be “unjustly enriched at the expense of another.” Milone & Tucci, Inc. v. Bona Fide Builders, Inc., 49 Wash.2d 363, 367, 301 P.2d 759 (1956).

To prevail on a claim of unjust enrichment, two elements must be established: (1) the party conferring the benefit must not be a volunteer; and (2) the party receiving the benefit must be unjustly enriched. Ellenburg v. Larson Fruit Co., 66 Wn.App. 246, 250, 835 P.2d 225, review denied, 120 Wn.2d 1011 (1992). Unjust enrichment occurs when a person has and retains money or benefits, which in justice and equity belong to another. Bailie Communications, Ltd. v. Trend Bus. Sys., Inc., 61 Wn.App. 151, 159, 810 P.2d 12, 814 P.2d 699, review denied, 117 Wn.2d 1029 (1991).

Without any legal authority whatsoever, the Respondents persuaded the trial court in effect to transfer what they argued was the property of the bankruptcy estate but which was DeVeny’s property, to them, thereby unjustly enriching the Respondents. In stating that the Respondents were being unjustly enriched, the trial court acknowledged its Order was contrary to the law.

VI. Court’s Order Violates CR 17(a).

Despite the disclaimer by the trustee, the trial court seemed to believe that the lawsuit should be dismissed because the real

party in interest was the bankruptcy estate, not DeVeny. The dismissal however was not done pursuant to the Court Rule that applies. Civil Rule 17(a) states:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The trial court should have stayed DeVeny's civil action so that she could petition the bankruptcy court to reopen her case and adjudicate the bankruptcy issues.

VII. DeVeny is Entitled to Attorneys Fees on Appeal.

Pursuant to RAP 18.1, DeVeny requests attorney's fees and costs on appeal. Because DeVeny is entitled to attorney's fees at trial, she is also entitled to attorney's fees on appeal. West Coast Stationary Eng'rs Welfare Fund v. Kennewick, 39 Wash.App. 466, 477, 694 P.2d 1101 (1985). See also Xieng v. Peoples National Bank of Washington, 63 Wash.App. 572, 821 P.2d 520 (1991).

DeVeny's tort claims grant her reasonable attorneys fees if she is the prevailing party. The Washington Trade Secrets Act, RCW 19.108.040 provides:

If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or wilful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.

Plaintiff is also entitled to recover attorneys fees pursuant to her Consumer Protection Act claim.

F. CONCLUSION

DeVeny requests that the Court reverse the trial court's Order granting summary judgment on her tort claims and her breach of contract claim and remand this matter over for trial in Thurston County Superior Court.

DATED this 11th day of October 2006

RAND L. KOLER & ASSOCIATES, P.S.



Patrick L. McGuigan, WSBA 28897

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON
BY *CM*

I certify that on October 11, 2006, I caused a ~~true and correct copy~~ of the Brief of Appellant to be served on the following in the manner indicated below:

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Signed and dated this 11th day of October 2006.

RAND L. KOLER & ASSOCIATES, P.S.



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