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NO. 35028-9-II

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

FILED  
COURT OF APPEALS  
JAN 10 10 41 AM '10  
WASHINGTON  
STATE COURTS  
BY  
IDENTITY

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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.*

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**REPLY BRIEF OF APPELLANT**

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RAND L. KOLER & ASSOCIATES, P.S.  
615 Second Avenue, Suite 760  
Seattle, WA 98104  
(206) 621-6440

Patrick L. McGuigan  
WSBA 28897  
Attorneys for Appellant

ORIGINAL

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## I. INTRODUCTION

Whereas DeVeny has established that the trial court's dismissal of her claims was outside its jurisdiction, was based on a complete misapplication of the federal bankruptcy code and on a disregard for well-established law, the Respondent fails to prove otherwise.

Respondents provide no conceivable basis for the dismissal of DeVeny's tort claims. 11 U.S.C. §554(c) provides that any property not otherwise administered at the close of the (bankruptcy) case reverts back to the debtor. DeVeny's bankruptcy was discharged on July 22, 2003, and all her scheduled assets, which included Tropic Tanz (trade name and client lists), leasehold interest, tanning beds, equipment and furniture, reverted back to her. Her tort claims did not arise until August 25, 2003.

The Respondents claim that the bankruptcy code's automatic stay provision voided the sale of DeVeny's business even though 11 U.S.C. §362(a) says it did not. The Respondents claim that as a debtor DeVeny was prohibited from selling Tropic Tanz even though 11 U.S.C. §362(a) and 11 U.S.C. §549 say she was not. The Respondents claim that DeVeny was required to amend her bankruptcy schedules to report the sale of her business even though 11 U.S.C. §549 says she was not. The Respondents claim DeVeny's property did not revert back to her upon her discharge even though 11 U.S.C. §554(c) says that it did. The Respondents claim

the trial court could set aside the sale of DeVeny's business even though 11 U.S.C. §549 says it could not. The Respondents claim that three years after agreeing to purchase Tropic Tanz the trial court could void the parties' contract even though 11 U.S.C. §549(d) says it could not.

## **II. ARGUMENT**

### **A. The Respondents Fail To Present Any Conceivable Basis To Support The Dismissal Of DeVeny's Tort Claims.**

#### **1. Pursuant To 11 U.S.C. §554(c) DeVeny's Scheduled Property Reverted Back To Her On July 22, 2003.**

Pursuant to 11 U.S.C. §554(c), scheduled assets that are not administered by the trustee revert to the debtor. In her bankruptcy schedules, DeVeny listed Tropic Tanz, her leasehold interest, tanning beds, other equipment and furniture. CP 148,149,160, 162<sup>1</sup> DeVeny exempted some of Tropic Tanz's property from her bankruptcy estate for operational purposes which remained hers. CP 264. 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, at which time ownership of Tropic Tanz, client lists, leasehold interest, business equipment and office furniture reverted back to her. CP 268.

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<sup>1</sup> DeVeny's monthly income from Tanning Salon.

It is impossible for DeVeny's tort claims to be the property of her closed bankruptcy estate as claimed by the Respondents. Respondents admit that during August 2003, they were negotiating a sale price for Tropic Tanz, her leasehold interest, client lists, tanning beds and other equipment and furniture. Respondents admit that on August 25, 2003, they ceased negotiations and refused to pay a purchase price for Tropic Tanz but continued to occupy and operate the business which they had locked her out of. CP 189-194. At that point in time, over a month after her bankruptcy was closed, DeVeny's tort claims arose

**2. DeVeny Has Standing To Sue.**

The Respondents wrongfully assert, with no authority, that DeVeny has not got standing to bring her tort claims. The doctrine of standing requires that a plaintiff must have a personal stake in the outcome of the case in order to bring suit. Virginia Gustafson v. Ragnar Gustavson & First Western Bank, 47 Wash.App. 272, 276, 734 P.2d 949 (1987). The Respondents, seasoned business women and owners of multiple *Curves* franchises, preyed on a small town owner-operator and cheated her out of the tanning business she had worked hard to build. Pursuant to the law, DeVeny has standing.

**3. DeVeny's Tort Claims Arose Separate From Her Breach Of Contract Claim.**

Deveny's tort and contract claims are separate and distinct. Contract law is designed to enforce expectations created by agreements, while tort law is designed to protect citizens and their property by imposing a duty of reasonable care on others. Berschauer/Phillips Constr. Co. v. Seattle School Dist. 1, 124 Wn.2d 816, 821, 881 P.2d 986 (1994). The Respondents provide no authority for their assertion that DeVeney's tort claims "fail" because they "arose" from her breach of contract claim.

**B. The Bankruptcy Court Has Exclusive Jurisdiction Over The Administration Of DeVeney's (Closed) Bankruptcy Eestate.**

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." 28 U.S.C. §1334(e). Here, the trial court purported to displace the Bankruptcy Court in the administration of the bankruptcy estate in DeVeney's closed bankruptcy case when it had no such jurisdiction. 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.

The Respondents provide no supportive authority for the trial court's exercising jurisdiction over the bankruptcy estate's property. The three Washington cases cited by Respondents are inapplicable because

they involve plaintiffs pursuing claims in superior court of which they were aware when they filed for bankruptcy but did not report on their schedules even though they were required to do so. The courts in these cases simply prevented the plaintiffs from benefiting from their violation and did not exercise jurisdiction over any property of the bankruptcy estate as the trial court did in this matter.

**C. The Automatic Stay Has No Application To This Case.**

The Respondents ask the Court to affirm the trial court's dismissal of DeVeny's claims because "The Automatic stay . . . barred her attempt to sell Tropic Tanz in June, (sic) 2003." However, this argument is contrary to bankruptcy law because 11 U.S.C. §362(a)'s automatic stay has no application to this case.

**1. The Purpose Of 11 U.S.C. §362(a) Is To Protect The Debtor From Creditor Collection Efforts.**

The automatic stay is intended to protect debtors from all collection efforts during the bankruptcy proceeding. As Congress stated:

The automatic stay . . . gives the debtor a breathing spell from his [or her] creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1978), reprinted in 1978 USCCAN 5963, 6296-97. The purpose of the automatic stay is “first to give the debtor a 'breathing spell' from his creditors; and second, to prevent one creditor from rushing to enforce its lien to the detriment of the other creditors.” Seattle First Nat'l Bank v. Westwood Lumber, Inc., 59 Wash.App. 344, 352, 796 P.2d 790 (1990).

The automatic stay could not be invoked under bankruptcy law by the Respondents, certainly not for the purpose for which they invoked it; the stay is intended to be the debtor’s shield, not a device to be wielded against the debtor in order to divest the debtor of her property by non-creditor law suit defendants.

**2. The Automatic Stay Does Not Apply To Sales Or Transfers Of Property Initiated By The Debtor.**

There is no authority whatsoever for the Respondents’ position that the automatic stay acts to void a transfer of property by the debtor (“The filing of a bankruptcy petition acts as a stay applicable to all persons . . .”). Brief of Respondents at 15. The trial court found that the sale of Tropic Tanz as an act in violation of the automatic stay was *void ab initio* under National Environmental Waste Corp. v. City of Riverside, 129 F.3d 1052 (9<sup>th</sup> Cir. 1997). This case, and the authority cited,

however, involve acts by creditors in violation of the stay and are inapplicable.

There is no dispute in the cases or treatises that the stay does not affect post-petition transfers by the debtor. “Sections 362’s automatic stay does not apply to sales or transfers of property initiated by the debtor.” In re. Schwartz, 954 F.2d 569, 574, (9<sup>th</sup> Cir. 1992); See also Vierkant v. Vierkant, No.99-6049MN, United States Bankruptcy Appellate Panel (8<sup>th</sup> Cir. 1999). In re Hill, 156 B.R. 998, 1007-09 (Bankr. N.D. Ill. 1993) the bankruptcy court said:

The salient point is that the automatic stay of section 362(a) and its text do not specifically prohibit the Debtor from voluntarily transferring an interest in property of the estate post-petition.

Id. at 1009 (quoting R. Ginsberg and R. Martin, Bankruptcy: Text, Statutes, Rules, § 906(c)[2] at 9-74 (3d ed. 1992)).

### **3. Post-Petition Transfers Can Only Be Set Aside By The Trustee Under Section 11 U.S.C. §549.**

The Ninth Circuit Court has observed:

The purpose of section 549 . . . is to provide a just resolution when the debtor himself initiates an unauthorized postpetition transfer. The general rule in such situations is that the trustee is authorized to avoid the transfer in order to protect the creditors.

40235 Washington Street Corp. v. Lusardi, 329 F.3d 1076, 1081 (9<sup>th</sup> Cir. 2003) (citing Schwartz Supra). The Schwartz court stated:

Section 549 allows the bankruptcy trustee to avoid certain authorized transfers and all unauthorized transfers of estate property.

Schwartz at 573. In another bankruptcy case, the Ninth Circuit Court stated the rule thusly:

Section 549 applies to unauthorized transfers of estate property which are not otherwise prohibited by the Code. *Garcia*, 109 Bankr. at 338-40 ; In re R & L Cartage & Sons, 118 Bankr. 646, 650-51 (Bankr. N.D. Ind. 1990) (adopting *Garcia* analysis). In most circumstances, section 549 applies to transfers in which the debtor is a willing participant. See *Garcia*, 109 Bankr. at 339 . For example, in a transfer unrelated to any antecedent debt, the debtor may sell a portion of the estate's property to a third person. The trustee has the power to avoid such a transfer under section 549.

In Re Mitchell, No. SC-01-1566-BmaP (9<sup>th</sup> Cir. 06/17/2002).

Even if the trial court were a bankruptcy court, the Respondents could not bring an action to void the contract; this must be done by the trustee. In this lawsuit, the trustee, Mr. Terrence Donohue, after being fully advised of the facts, submitted to the trial court a declaration stating among other things that he would not seek to avoid the transfer at issue and disclaimed any interest in the subject property. CP 59-60.

**D. The Bankruptcy Code's Statute of Limitations Bars Avoidance Of The Contract.**

As a matter of bankruptcy law, the contract could no longer be voided by the trial court. The statute of limitations ran when the

bankruptcy was concluded. 11 U.S.C. §549(d) which relates to post-petition transfers states:

(d) An action or proceeding under this section may not be commenced after the earlier of—

(1) two years after the date of the transfer sought to be avoided; or

(2) the time the case is closed or dismissed.

Bankruptcy was concluded on July 22, 2003.

**E. DeVeney Was Not Required To Amend Her Bankruptcy Schedules And List The Contract For The Sale Of Her Business.**

DeVeney was not required to amend her bankruptcy schedules and list the contract for the sale of Tropic Tanz because post-petition contracts are not considered to be the property of the estate. 11 U.S.C. §541(a)(5) specifically defines what type of property when acquired by the debtor after filing is considered the property of the estate:

The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

Pursuant to the bankruptcy code, DeVeny was not required to amend her schedules to include the contract she entered into on June 27, 2003. Also, pursuant to 11 U.S.C. §541(a)(5) even if DeVeny's tort claims would have arose after filing, but before she was discharged on July 22, 2003, she would not have been required to amend her schedules to report them either.

**F. DeVeny Is Not Judicially Estopped From Pursuing Her Claims.**

DeVeny is not judicially estopped from pursuing any of her claims because the doctrine only applies when a bankruptcy debtor does not disclose a claim or potential claim of which he/she was aware when filing for bankruptcy. *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001). For example, in *Johnson*, the plaintiff who chipped his tooth after biting into a sandwich at defendant's restaurant during the pendency of his bankruptcy proceeding, but prior to discharge, was allowed to maintain a personal injury action post-discharge:

The debtor's obligation to disclose assets and liabilities by preparing and filing bankruptcy schedules is governed by statute, 11 U.S.C. §521(1) and court rule, Fed. R. Bankr. P. 1007. The specific obligation to amend the debtor's bankruptcy schedules to disclose assets acquired after the commencement of the case is regulated by Fed. R. Bankr. P. 1007(h).«1» The rule limits the debtor's obligation to disclose after-acquired property to the property identified in 11 U.S.C. §541(a)(5).

Johnson v. Si-Cor Inc., 107 Wn. App. at 910.

Section 541(a)(5) does not include other interests acquired by the debtor after the commencement of the case, such as Mr. Johnson's claim against McDonalds.

Johnson v. Si-Cor Inc., 107 Wn. App. at 911.

In Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 232, 108 P.3d 147 (2005) the court applied the doctrine of judicial estoppel and upheld the dismissal of a plaintiff's personal injury claim because he was aware of it before he filed for bankruptcy and did not disclose it in his filing: The Cunningham court distinguished Johnson v. Si-Cor Inc. stating:

An important distinction between Johnson and this case is that there, the debtor acquired the claim during the pendency of his bankruptcy. The Bankruptcy Code did not require him to disclose the post-petition asset. Moreover, under Chapter 7 of the Bankruptcy Code, he was entitled to retain any proceeds of his lawsuit. Thus, he neither

received a benefit from nondisclosure of the asset nor did he involve the court in accepting an inconsistent position.

Cunningham, 126 Wn. App. at 232.

The court in Garret v. Morgan, 127 Wn. App. 375, 381-82 (2005) distinguished Johnson for the same reason.

It is indisputable that all of DeVeney's claims arose after she filed for bankruptcy in April 2003, therefore, judicial estoppel is inapplicable.

**G. The Trial Court's Error In Violating CR17(a) Is Properly Before The Court.**

The trial court acknowledged its violation of CR17(a) during the May 5, 2006 summary judgment hearing so it is incongruous for the Respondents to claim DeVeney is raising the issue for the first time on appeal. The trial court stated "I believe that a claim should have been brought in the name of the bankruptcy estate" and "Civil Rule 17 indicates no action shall be dismissed on the ground that it is not prosecuted in the name of the real party until a reasonable time has been allowed after objection for joinder or substitution of the real party in interest" but still dismissed DeVeney's claims. RP 19:21-20:5.

Furthermore, on May 12, 2006, DeVeney filed a motion for reconsideration in which she requested the court reverse its decision to dismiss her claims in part based on its violation of CR 17(a). CP 12-13. The trial court "reviewed" the motion and denied it. CP 1. The

Respondents assertion that the issue of the trial court's violation of CR 17(a) is raised on appeal for the first time is without merit.

**H. The Numerous Factual Issues in Dispute Are Not Relevant On Appeal.**

At all times DeVeny believed she had sold her entire business, leasehold interest, client lists equipment and furniture to Respondents for \$35,000. When she was contacted by the Department of Revenue about business taxes she related she sold Tropic Tanz on July 18, 2003, which was the day she temporarily left town to take care of her mother who had suffered from a heart attack and the Respondents started to operate it. The Department of Revenue then closed her "account." CP 300.

After getting their foot in the door, the Respondents went back on the deal and locked DeVeny out of her business and refused to pay her for it. To facilitate their deceit Respondents told the landlord, Bill Allegre, DeVeny had abandoned her business. CP 386-388.

These facts and numerous other facts are in dispute and are not relevant to the issues of law before the Court.

**III. CONCLUSION**

The Respondents brief is a catalogue of legal error because it misapplies, misstates and misrepresents the bankruptcy code and it

establishes that the trial court's dismissal of DeVeny's claims was in error.

The Court should reverse and remand this matter for trial.

The Court should also order that DeVeny is entitled to attorneys fees on appeal.

DATED this 9<sup>th</sup> day of January 2006

RAND L. KOLER & ASSOCIATES, P.S.



Patrick L. McGuigan, WSBA 28897

CERTIFICATE OF SERVICE

I certify that on January 10, 2007, I caused a true and correct copy of the Brief of Appellant to be served on the following in the manner indicated below:

<b>Via:</b>	<b>To:</b>
<input checked="" type="checkbox"/> Legal Messenger	<u>Respondents' Counsel</u>
<input type="checkbox"/> Facsimile	Paul Cane/Dana C. Hoerschelmann
<input type="checkbox"/> Mail	Thorsrud Cane & Paulich
	1325 Fourth Avenue, Suite 1300
	Seattle, WA 98101
<input checked="" type="checkbox"/> Legal Messenger	<u>Life &amp; Goodness, Inc.'s Counsel</u>
<input type="checkbox"/> Facsimile	Patrick Kang
<input type="checkbox"/> Mail	Premier Law Group
	3131 Elliott Avenue, Suite 710
	Seattle, WA 98121

Signed and dated this 10<sup>th</sup> day of January 2007.

RAND L. KOLER & ASSOCIATES, P.S.



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Marison Hund, Legal Assistant

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